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IN THE

Supreme Court of the United States

October Term, 1989

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETER A. BRADFORD, HAROLD A. JERRY, JR., GAIL GARFIELD SCHWARTZ, ELI M. NOAM, JAMES T. MCFARLAND, EDWARD M. KRESKY and HENRY G. WILLIAMS, in their official capacity as Commissioners of the Public Service Commission of the State of New York,

Petitioners,

vs.

NATIONAL FUEL GAS SUPPLY CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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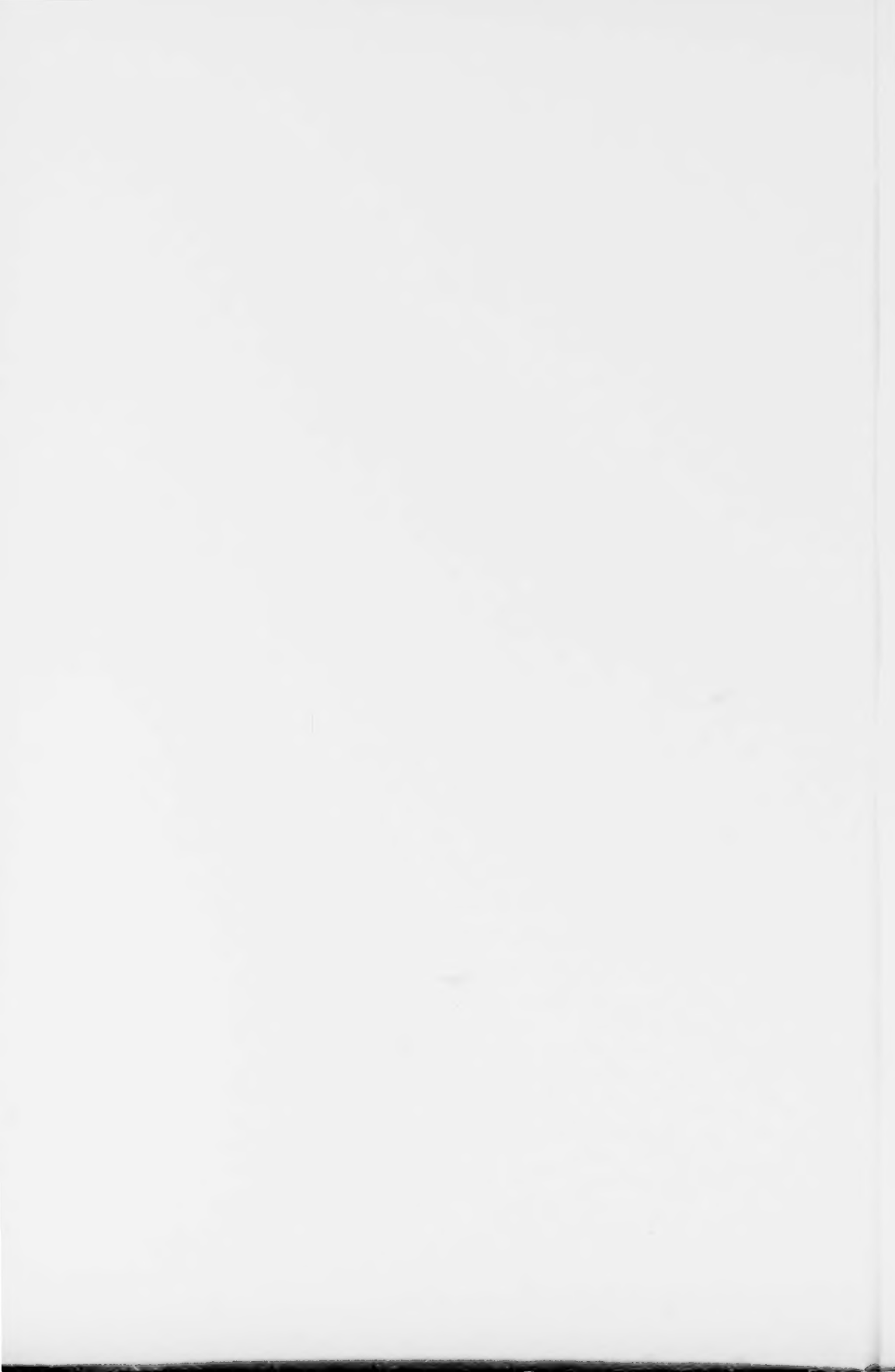
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Dated: Albany, New York
May 10, 1990

185



Questions Presented

1. Does state site-specific regulation of interstate gas transmission lines conflict with regulation by the Federal Energy Regulatory Commission (FERC), which allocates site-specific questions to the states?

2. Does either the Natural Gas Act (NGA) or the National Environmental Policy Act (NEPA) evidence a Congressional intent to preempt states from regulating site-specific environmental issues not addressed by the FERC's review of interstate gas pipelines?

Parties to the Proceeding

In the Court below, National Fuel Gas Supply Corporation (NFG) was the appellant and the Public Service Commission of the State of New York (PSC) and its members were appellees. *Amicus Curiae* briefs were filed in support of NFG by Columbia Fuel Gas Transmission Corporation, the Interstate Natural Gas Association of America and Algonquin Gas Transmission Company. Briefs were filed in support of the PSC by *amici curiae* National Association of Regulatory Utility Commissioners and the State of Vermont.

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NATIONAL FUEL GAS
SUPPLY CORPORATION,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

The Public Service Commission of the State of New York petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit (Appendix "*App.*" A *infra*, 1a-25a) is reported at 894 F.2d 571. The bench decision of the United States District Court for the Northern District of New York (App. B *infra*, 26a-36a) is not reported. Orders of the Federal Energy Regulatory Commission Authorizing Abandonment and Issuing Certificate, and Modifying Certificate with respect to the NFG pipeline in this case (App. C *infra*, 37a-42a) are reported at 35 F.E.R.C. (CCH) ¶62,490 and 44 F.E.R.C. (CCH) ¶62,015.

Jurisdiction

The judgment of the Court of Appeals was entered on January 24, 1990 (App. *infra*, 19a-20a). A timely-filed petition for rehearing was denied on March 14, 1990 (App. *infra*, 21a-22a). A timely-filed motion for a stay was granted on April 27, 1990, on condition that a petition for writ of certiorari be filed within 14 days (App. *infra*, 23a-25a). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

**Statutory and Regulatory
Provisions Involved**

Article VII of the New York Public Service Law (PSL), 47 McKinney's Consolidated Laws of New York, is reprinted as Appendix E to this petition (App. *infra*, 48a-63a). Pertinent provisions of the Natural Gas Act of 1938, 15 U.S.C. §§717-717w, are reprinted as Appendix F to this petition (App. *infra*, 64a-71a). Pertinent excerpts from Federal Energy Regulatory Commission (FERC) regulations, 18 C.F.R., are reprinted as Appendix G (App. *infra*, 72a-157a).

Statement of The Case

Background

In the past, states and localities have protected streams, wetlands, vistas, roads, landmarks, wildlife and other facets of both the natural and human environments by site-specific regulation of interstate gas pipelines. Site-specific environmental regulation takes construction as a given and selects the particular construction methods that will minimize a line's impact on its immediate surroundings (See n. 10, *infra*). The decision from which the PSC seeks review would preempt a New York State statute that has protected local resources while expediting the construction of interstate facilities by centralizing site-specific regulation in a single state agency.

The NGA and NEPA

The Natural Gas Act (NGA) was passed in 1938 to protect consumers against excessive rates charged by interstate gas companies. Its purpose was to fill a regulatory void created by the inability of states to regulate the rates of interstate pipelines. See, *Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 519 (1947).

Congress enacted the National Environmental Policy Act (NEPA) in 1970 to require federal agencies to take a hard look at the environmental consequences of their actions. In codifying rules implementing NEPA (18 CFR Part 2) (subsequently modified as 18 CFR Part 380) the Federal Power Commission (now the FERC) made it clear that state and local governments would continue to have a strong role in the protection of environmental

resources. 18 C.F.R. Part 380, App. A ¶9.1 (App. *infra*, 155a.)¹

Article VII of the New York Public Service Law

Prior to 1970, a multiplicity of local and state proceedings delayed construction of gas pipelines in New York State.² In 1970, the New York State Legislature therefore centralized review of major gas pipeline construction in the New York PSC. Centralization continued to protect environmental resources while expediting completion of major projects.

Article VII not only empowered the PSC to waive unreasonably restrictive local ordinances (PSL Section 126(f)), but authorized the Commission to limit its regulation to matters not addressed by federal regulation. That is, the statute's "savings clause" restricts its application to federally-certified facilities to matters *not* preempted by federal law.³ Under its existing policy,⁴ the PSC studies the potential effects of

¹ In particular, the rules require applicants for certificates to "[i]dentify all necessary Federal, regional, State and local permits, licenses and certificates needed before the proposed action can be completed, such as permits needed from state and local agencies for construction and waste discharges." 18 CFR Part 380, App. A ¶ 9.1 (App. *infra*, 155a). FERC's rules also require an applicant to "[l]ist all authorities consulted for obtaining permits, licenses, and certificates, including zoning approvals needed to comply with applicable statutes and regulations." *Id.*, ¶ 9.1.1 (App. *infra*, 155a).

² See 1970 New York Laws Chapter 272 ["present practices . . . have resulted in delays in new construction and increases in cost which are eventually passed on to the people of the state in the form of higher utility rates"].

³ Section 121(4)(c) provides that Article VII does not apply to a major utility transmission facility exclusively regulated by the federal government.

⁴ The PSC's position on the issues subject to Article VII review evolved from several proceedings that allowed it to examine the legitimate role of New York State in complementing FERC regulation of interstate pipelines.

proposed lines on particular habitats, wetlands, rivers, agricultural lands or other elements of the micro-environment and determines what construction practices are necessary to expeditiously complete projects while protecting local resources.

FERC's Certification of NFG's Re-routing

In 1986, National Fuel Gas Supply Corporation (NFG) petitioned the FERC for permission to replace and re-route approximately 1.8 miles of interstate gas pipeline in Erie County, New York (App. *infra*, 37a). FERC granted the request (App. *infra*, 39a), but NFG subsequently asked FERC to authorize a slightly different route (App. *infra*, 40a). On July 5, 1988, FERC granted that request, but noted that NFG had to comply with state and local requirements for "stream crossing and road crossing permits" (App. *infra*, 41a).

The District Court's Rejection of NFG's Facial Challenge to Article VII

Rather than obtain stream and road crossing permits from the PSC, NFG petitioned Federal District Court for a declaratory judgment that it need not comply with PSL Article VII. It argued that FERC's permission to re-route its facility facially preempted New York State law on all matters, including site-specific environmental review relevant to permits.

On April 7, 1989, in a bench ruling, District Court Judge Howard G. Munson granted a PSC motion for summary judgment on the grounds that: (1) FERC's regulations and certificate of NFG's re-routing called for site-specific environmental review of NFG's facility by state or local officials (App. *infra* 30a, 34a-35a); (2) PSL Article VII empowered the New York PSC to grant the local permits required by FERC's order and, at the same

time, to refrain from regulation that would have frustrated FERC's certificate (App. *infra*, 31a-32a); and, (3) federal law permitted FERC to leave local environmental matters to the states (App. *infra*, 35a).

The Second Circuit's Reversal

NFG appealed and on January 24, 1990, the Second Circuit reversed Judge Munson's decision. It held, essentially, that the Supremacy Clause prohibits the application of any portion of Article VII to an interstate gas pipeline (App. *infra*, 1a-18a).

The Second Circuit stated that if it "were a New York state court" it would decide that Article VII's savings clause did not allow the PSC to avoid infringing on federal regulation (App. *infra*, 14a). It added that even if Article VII could be narrowed, the discretion that it gave the PSC to avoid conflict with FERC regulation *could* undermine FERC authority by forcing pipeline companies to litigate the scope of the PSC's authority in state tribunals (App. *infra*, 15a-16a).⁵ Lastly, the Court decided that the PSC could not, in any event, engage in site-specific regulation of interstate gas pipelines because federal law preempted all environmental regulation of interstate gas pipeline facilities (App. *infra*, 16a-17a).

The PSC timely petitioned for rehearing. Its petition for rehearing was denied on March 14, 1990 (App. *infra*, 21a-22a). The PSC thereupon moved for clarification of the decision and for a stay pending application for certiorari. By decision dated April 27, 1990 the motion for clarification was denied, but the motion for a stay was granted upon the condition that a petition for certiorari be filed within 14 days (App. *infra*, 25a).

⁵ Of course, no New York court has yet to read the savings clause in the manner of the Second Circuit and the PSC does, in fact, limit its review of interstate lines to matters not addressed by FERC (App. *infra*, 44a, 46a).

REASONS FOR GRANTING THE WRIT

This petition asks the Court to determine whether the NGA or NEPA preempts states from mollifying the site-specific environmental effects of interstate gas pipeline projects.⁶ The NGA was enacted because the states could not protect consumers from the economic power of interstate pipelines. Contrary to the decision below, it does not preempt site-specific environmental regulation.

The Second Circuit concluded that FERC's consideration of environmental issues under NEPA preempts the states from site-specific regulation. NEPA was not intended to be a preemptive statute and the Second Circuit's conclusion that FERC's environmental regulation of pipelines exhausts the field is totally at odds with FERC's practice.

The Second Circuit erroneously read *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293 (1988), as holding that all state environmental regulation of interstate gas pipelines was preempted. The only state regulation that was preempted in *Schneidewind* was that which "had as its central purposes the maintenance of [interstate pipeline companies'] rates at what the State considered a reasonable level, and their provision of reliable service." *Northwest Central Pipeline Corporation v. State Corporation Commission of Kansas*, _____ U.S. _____, 109 S. Ct. 1262, 1275, n. 10 (1989). It did not extend to preemption of environmental review; indeed, environmental review was not an issue in that case.

⁶ The established rule has been that state environmental regulation is permissible and, indeed, its propriety has been recognized by FERC rules. 18 CFR Part 380, App. A ¶9 (App. *infra*, 155a); *ANR Pipeline Co. v. Iowa State Commerce Commission*, 828 F.2d 465 (8th Cir. 1987).

Finally, the decision below merits review because it departs from the well-established standard for determining whether federal law preempts state law. Where a party attempts to remove the states from an area traditionally regulated by local government, the courts "[s]tart with the assumption that the historic police powers of the states were not to be superseded unless . . . that was the clear and manifest purpose of Congress". *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985). See, *Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission*, 461 U.S. 375, 389 (1983).

In challenging the facial constitutionality of a state statute, one must show that the statute *cannot* be interpreted in a constitutional manner. *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572, 580 (1987); *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982). Therefore, in order to preempt Article VII of the Public Service Law, which empowered the Commission to regulate site-specific environmental matters, the lower court had to find: (1) a clear congressional intent to preempt the states from regulating site-specific environmental matters; and, (2) that Article VII simply could not be read in a manner that was consistent with federal regulations. As indicated below, the Second Circuit met neither standard.

I. Neither the NGA nor NEPA evinces the slightest congressional intent to preempt limited, site-specific regulation of the environmental effects of interstate gas pipelines.

A. The NGA Was Not Intended To Preempt Site-Specific Environmental Review By The States.

The Second Circuit concluded that in enacting the NGA "Congress intended to vest exclusive jurisdiction to regulate pipelines in the FERC" (App. *infra*, 11a). However, it failed to cite a single word of the NGA supporting its conclusion that Congress intended to preclude the states from site-specific environmental regulation. Indeed, the history of the NGA refutes any claim that the statute was intended to preempt state environmental regulation.

The NGA was enacted because states were unable to regulate the prices charged by interstate pipelines. "[I]ncreasing concentration in the [gas pipeline] industry was producing vast economic power for the pipelines and a serious threat of unreasonably high prices for consumers." *Federal Power Commission v. Louisiana Power & Light Co.*, 406 U.S. 621, 638 (1972). As House and Senate reports stated, however, gas sales in interstate commerce were

considered to be not local in character and, even in the absence of Congressional action, not subject to state regulation [citations omitted]. The basic purpose of the federal legislation is to occupy this field in which the Supreme Court has held that the states may not act.

75th Congress, 1st Session, Senate Report No. 1162 at 2;
75th Congress, 1st Session, House Report No. 709 at 2.

In enacting the Natural Gas Act, therefore, Congress "was meticulous to take in only territory which this Court had held the states could not reach."⁷ *Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 519 (1947) [upholding a state's imposition of a certification requirement before an interstate pipeline company could make a direct sale to an industrial customer]. Thus, Congress "'did not envisage federal regulation of the entire natural gas field to the limit of constitutional power. Rather, it contemplated the exercise of federal power as specified in the Act. . . ." *FPC v. Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 502-503 (1949)." *N.W. Cent. Pipeline v. State Corp. Comm'n of Kansas*, 109 S.Ct. at 1273. It would be illogical to conclude that the NGA evinced a congressional intent to regulate an area for which there had never been held to be a void; to wit, state environmental regulation of interstate pipelines.⁸

⁷ National Fuel has argued that this meticulousness of Congress related to the drawing of a "bright line" between FERC's exclusive jurisdiction and state jurisdiction. This "bright line" applies, however, to the setting of rates and control of service for wholesale sales regulated by the Natural Gas Act. See, *Mississippi Power and Light Company v. Mississippi ex rel. Moore*, _____ U.S. _____, 108 S.Ct. 2428, 2440 (1988) ["Congress has drawn a bright-line between state and federal authority in the setting of *wholesale rates* and the regulation of agreements that affect *wholesale rates*" (emphasis added)]; *FPC v. Southern California Edison Company*, 376 U.S. 205, 215-216 (1964) [line drawn between state and federal jurisdiction for purposes of sales]; *Northwest Central Pipeline Corporation*, 109 S.Ct. at 1274-75 [bright line between state and federal control over gas production].

⁸ Both legislative reports observed that "[t]he bill takes no authority from state commissions", House Report, *supra*, at 2, Senate Report, *supra*, at 2, and "that this legislation is highly desirable to fill the gap in regulation that now exists by reason of the lack of authority of the state commissions." House Report, *supra*, at 3, Senate Report, *supra*, at 3.

(Footnote continued on following page.)

This Court has recently granted certiorari to review whether the Federal Power Act prevents states from imposing environmental requirements, *i.e.*, restriction of water flows, on a hydroelectric facility certified by the FERC. *California v. FERC*, 877 F.2d 743 (9th Cir. 1989), *U.S. app. pending*. The Court should also grant certiorari here to determine whether the Natural Gas Act restricts state environmental review.

B. Article VII Does Not Conflict With Federal Environmental Review Under NEPA.

While NEPA requires agencies to consider and disclose the environmental impact of their actions, *Baltimore Gas and Electric Company v. Natural Resources Defense Council, Inc.*, 462 U.S. 87, 97-98 (1983), it certainly does not exhaust the field of environmental regulation. The Second Circuit nonetheless reasoned that because FERC's regulations implementing NEPA required National Fuel to provide environmental data, including an environmental impact statement, "states may not engage in concurrent site-specific environmental review" (*App. infra*, 17a).

Inasmuch as NEPA was not intended as a preemptive statute, the real question is not whether NEPA requires FERC to develop an Environmental Impact Statement, but whether there is a conflict between federal environmental review under NEPA and state

(Footnote continued from preceding page.)

Federal Power Comm'n v. East Ohio Gas Co., 338 U.S. 464, 473 (1950), emphasizes that the measure of federal power under the Natural Gas Act is the prior decisions of this Court preempting state regulation. Those decisions in no way preempt state environmental regulation of interstate companies.

environmental review.⁹ The record evidence demonstrates that there is no such conflict in practice. Mr. Dana Roberts, in the only affidavit presented on this issue, stated unequivocally that "there is no conflict between FERC and the [New York Department of Public Service] . . . the DPS staff performs several key functions not addressed by federal law . . ." (App. *infra*, 44a-46a). Indeed, as indicated, FERC has required pipelines, including NFG, to obtain permits from state authorities entrusted with site-specific review (App. *infra*, 41a).

Although National Fuel's 1.45 mile pipeline in this case crosses farmland, protected streams, a school yard, residential areas, and roadways, FERC's certification did not address how the land use, traffic management and other site-specific impacts of these crossings would be minimized.¹⁰ Its environmental analysis addressed

⁹ State regulation will be preempted if state and federal regulation conflict because compliance with both is impossible, or because state regulation stands as an obstacle to the achievement of congressional purposes. *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 142-43 (1962); *Hillsborough*, 471 U.S. at 713.

¹⁰ If a line crosses farmland, some regulatory agency must preserve the land's drainage capabilities. In crossing protected streams the responsible agency must establish measures to protect spawning beds in the stream. If a line passes through residential areas, some agency must control construction noise, traffic and dust. For the crossing of roads, some agency must require traffic management techniques. None of these issues were addressed by FERC's environmental review in this case.

factors relevant to the siting of the facility, not how to mollify site-specific environmental impact.¹¹

The Second Circuit's decision fails to recognize the difference between siting of a transmission line on a piece of land and analysis of the steps necessary to protect that land from the impact of that siting. A similar distinction between land use planning and environmental regulation was recognized by this Court in *California Coastal Commission*. As the Court explained, "the core activity described by each phrase is undoubtedly different. Land use planning in essence chooses particular uses for the land; environmental regulation, at its core, does not mandate particular use of the land but requires only that, however the land is used, damage to the environment is kept within prescribed limits." *California Coastal Commission*, 480 U.S. at 587. As applied to an interstate pipeline, Article VII does not require that particular land be chosen as the site for a project, but simply that reasonable measures be taken to minimize damage to the particular site.

¹¹ In particular, National Fuel's application to the FERC in this case presented only the most general information about pipeline location, without specific detail about the resources affected. In contrast, National Fuel would have to file a variety of site-specific data with the Commission pursuant to Article VII.

II. The lower court's decision conflicts with recent holdings of this court.

In concluding that Congress entrusted FERC with responsibility for all aspects of interstate pipelines, the court below did not cite a single provision of either NEPA or the NGA. In fact, the court did not even reference a sentence of either Act's legislative history. The Second Circuit essentially rested its decision to override a major article of New York State's Public Service Law on dicta from *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293 (1988).

Schneidewind overturned a state statute governing security issuances by interstate pipeline companies because it constituted regulation of the rates and facilities of natural gas companies. 485 U.S. at 306. This Court reasoned that Michigan was both attempting to regulate rates, by controlling the equity levels of such companies, and seeking to control construction of interstate facilities, by ensuring that companies be able to maintain them. 485 U.S. at 308. It, therefore, overturned the Michigan statute, adding that states may not take action that affects "interstate facilities".

Reasoning that Article VII review affects interstate facilities, and that *Schneidewind* prevents the states from taking action that affects interstate facilities, the court concluded that *Schneidewind* supports the preemption of Article VII (App. *infra*, 11a-12a, 16a-17a). The lower court has erred because in prohibiting state regulation that affects interstate "facilities", *Schneidewind* was focusing on regulation, of security issuances, that impeded—and could easily prevent—construction, not regulation that took construction as a given and simply attempted to control environmental damage.

Similarly, while the regulation of financing that was at issue in *Schneidewind* could halt federal projects, Article VII's limited regulation of streams and wetlands simply requires construction mitigation practices to protect local resources. Site-specific environmental regulation does not present a "disagreement between state and federal authorities over the wisdom of the project" (*Schneidewind*, 485 U.S. at 310). It neither prohibits, nor impedes, the construction of interstate lines.¹²

¹² If there is any question that the Court in *Schneidewind* did not intend to prohibit environmental regulation of interstate pipelines by the states, it is answered by *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, _____ U.S. _____, 109 S.Ct. at 1276, which sanctioned the indirect impact of environmental regulation on interstate facilities. See also, *Panhandle Eastern Pipeline*, 332 U.S., *supra* at 519, which directly refutes the Court's reading of the NGA as a preemptive statute.

III. The court's decision to overturn Article VII reflects a misreading of Public Service Law Section 121(4)(c) and misapplies the standard for reviewing facial challenges to duly enacted state legislation.

In challenging the facial constitutionality of a duly enacted state statute, one must show that the statute *cannot* be interpreted in a constitutional manner. *Webster v. Reproductive Health Service*, 109 S. Ct. 3040, 3050 (1989); *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572, 580 (1987); *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489 (1982). The Second Circuit, nonetheless, concluded that Article VII must be preempted because, among other things, the Commission *could* use the statute to overstep its jurisdiction, force litigation and, thereby, impede construction of interstate facilities (App. 15a-16a). Such speculation runs directly afoul of the instruction that facial challenges must be rejected unless state statutes simply *cannot* be enforced in a constitutional manner. *Webster v. Reproductive Health Service*, 109 S.Ct. at 3050; *California Coastal Commission v. Granite Rock Co.*, 480 U.S. at 580.

In *California Coastal Commission*, California's statute declared "that the Coastal Commission will 'provide maximum state involvement in federal activities allowable under federal law or regulations....'" *California Coastal Commission*, 480 U.S. at 586. Thus, the California statute upheld in that case was no more specific than Section 121(4)(c).

The Second Circuit has charted new, dangerous waters by basing a decision to preempt state law on a policy determination that Article VII has not worked to expedite pipeline construction and has a *potential* for PSC abuse. That policy determination is not only

wrong,¹³ but it is directly at odds with the teaching of this Court on reviewing facial challenges to state statutes. A state's method of issuing permits for road or stream crossings should not be preempted unless the state's method impedes a federal purpose; to wit, the construction of interstate facilities. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). The record evidence shows that Article VII does no such thing (App. *infra*, 46a) ["New York State's 'one-stop' permit process generally accelerates construction"]. Thus, it should not be preempted.

¹³ Again, Article VII expedites the issuance of state and local permits. While some Article VII proceedings have been subject to delays, pipelines would have experienced much more serious delays if they had been forced to obtain permits from local governments.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court
of Appeals for the Second Circuit
Dated April 27, 1990

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 231—August Term, 1989
(Argued: November 6, 1989 Decided: January 24, 1990)
Docket No. 89-7458

NATIONAL FUEL GAS SUPPLY CORPORATION,
Plaintiff-Appellant,
—v.—

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW
YORK, PETER A. BRADFORD, HAROLD A. JERRY,
JR., GAIL GARFIELD SCHWARTZ, ELI M. NOAM,
JAMES T. MCFARLAND, EDWARD M. KRESKY, and
HENRY G. WILLIAMS, in their official capacity as
Commissioners of the Public Service Commission of
the State of New York,
Defendants-Appellees.

Before:

TIMBERS and WINTER, *Circuit Judges,*
and LEISURE,* *District Judge.*

* The Hon. Peter K. Leisure, United States District Judge for the
Southern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the Northern District of New York (Howard G. Munson, *Judge*) denying plaintiff's motion for summary judgment and granting defendants' motion for summary judgment. Because the state regulatory scheme in question encroaches upon the jurisdiction of the Federal Energy Regulatory Commission, it is preempted.

Reversed.

GRANT S. LEWIS (Bruce V. Miller, Ronald J. Gizzi, Jon R. Mostel, LeBoeuf, Lamb, Leiby & MacRae, New York, New York, Richard DiValerio, David W. Reitz, National Fuel Gas Supply Corporation, Buffalo, New York, of counsel), *for Plaintiff-Appellant*.

JONATHAN D. FEINBERG (William J. Cowan, Public Service Commission of the State of New York, Albany, New York, of counsel), *for Defendants-Appellees*.

WINTER, *Circuit Judge*:

This appeal involves the interrelationship between state and federal regulatory authorities governing the planning and construction of pipeline facilities for the interstate transportation of natural gas. Appellant National Fuel Gas Supply Corporation ("National Fuel") brought this action in the Northern District of New York seeking a

declaratory judgment and an injunction to prevent the Public Service Commission of the State of New York ("PSC") from regulating certain of National Fuel's pipeline facilities under Article VII of the Public Service Law of the State of New York, N.Y. Pub. Serv. Law §§ 120-130 (McKinney 1989). In proceedings before the Federal Energy Regulatory Commission ("FERC") National Fuel had obtained a federal permit to construct a length of pipeline in West Seneca, New York. The basis for the instant action is National Fuel's claim that the FERC proceedings preempted enforcement by the PSC of Article VII's requirements with regard to the project.

National Fuel and the PSC filed cross-motions for summary judgment. Judge Munson granted the PSC's motion, holding that Article VII could be applied by the PSC so as not to conflict with the federal regulatory scheme. We disagree and reverse.

BACKGROUND

1. Federal Regulatory Framework and National Fuel's Application

National Fuel transports and sells natural gas in interstate commerce and is a "natural-gas company" subject to FERC regulation under Section 717a(6) of the Natural Gas Act, 15 U.S.C. §§ 717-717z (1988). Pursuant to Section 717f(c), a natural-gas company must obtain a "certificate of public convenience and necessity" from the FERC before constructing or operating facilities used for the interstate transportation and sale of natural gas. Similarly, before abandoning any portion of those facilities, a natural-gas company must obtain the permission and approval of the FERC. *See* 15 U.S.C. § 717f(b).

Acting under the Natural Gas Act and the Natural Gas Pipeline Safety Act, 49 U.S.C. app. §§ 1671-1686 (1982 & Supp. V 1987), the FERC has promulgated detailed regulations concerning applications for such certificates and for orders permitting abandonment. *See* 18 C.F.R. Part 157, Subpart A (1989). These regulations require an applicant to attach certain exhibits to its application. These are to provide data pertinent to the abandonment of the old line, 18 C.F.R. § 157.18, and to describe the characteristics of the new pipeline project, 18 C.F.R. § 157.14. The necessary exhibits include a map showing the location and dimensions of the new project, flow diagrams representing daily operational capacity with and without the proposed change, and a statement setting forth the arrangements regarding the supervision and management of the new construction. 18 C.F.R. § 157.14(a).

In addition, the FERC requires a statement of factors considered by a natural-gas company in arriving at a given site proposal. These include a discussion of the possibility of using existing rights-of-way, 18 C.F.R. § 157.14(a)(6-a), and, if applicable, a statement explaining the factors considered in routing a facility through an officially designated scenic, historic, recreational or wildlife area with a list of the designated federal or state authorities notified by the applicant of the proceeding before the FERC, 18 C.F.R. § 157.14(a)(6-b). An applicant must also provide a statement that it has followed the guidelines for planning, locating, constructing and maintaining facilities set out in 18 C.F.R. § 2.69, in order that "[i]n the interest of preserving scenic, historic, wildlife and recreational values, the construction and maintenance of facilities authorized by certificates granted under Section 7(c) of the Natural Gas Act should be undertaken in a manner that will minimize adverse effects on these values." *See also* 18 C.F.R.

§ 157.14(a)(6-c). Also, as required by the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370 (1982 & Supp. V 1987), an applicant must submit an environmental impact statement detailing potential adverse effects of the project and alternatives which might avoid them. 18 C.F.R. § 157.14(a)(6-d).

FERC regulations provide for the participation of interested parties in certification proceedings. Notice of each application is published in the Federal Register, with a copy of the notice mailed to the affected state or states. 18 C.F.R. §§ 157.9, 157.10. State commissions may intervene as of right. 18 C.F.R. § 385.214.

On January 21, 1986, National Fuel filed an application with the FERC seeking permission to abandon 1.78 miles of interstate pipeline and an accompanying regulator station. It also sought a certificate of public convenience and necessity authorizing construction of a replacement line of 1.61 miles of pipe and a new regulator station. The facilities to be abandoned and the proposed replacements are all located in the town of West Seneca, Erie County, New York. Both the old facility and the replacement are designed solely to transport natural gas in interstate commerce. The PSC was given notice of National Fuel's application but declined to exercise its right to intervene.

On June 16, 1986, the FERC issued an order approving the proposed abandonment and issuing a certificate of public convenience and necessity for the West Seneca project, "authorizing National Fuel to construct and operate the subject facilities and to deliver gas at the new delivery point." In October 1987, National Fuel filed a petition to revise the route of the replacement pipeline to run 1.45 miles instead of 1.61 miles. Revisions were made to the project exhibits, including the environmental report. The

PSC again declined to intervene. On July 5, 1988, the FERC issued an Order Amending Certificate approving the revised route.

2. *The New York Regulatory Framework and the Instant Action*

New York State, under Public Service Law Section 121, requires persons proposing to construct natural gas transmission lines extending one thousand feet or longer to be used to transport gas at pressures of one hundred twenty-five pounds per square inch or more to obtain a "certificate of environmental compatibility and public need" from the PSC. N.Y. Pub. Serv. Law § 121 (McKinney 1989). National Fuel's project in the instant matter meets these jurisdictional dimensions.

Article VII of the Public Service Law governs the PSC's handling of certification procedures. Section 126 provides that before issuing such a certificate the PSC "shall find and determine" several factors. Although there are seven factors in all, only five of them need be met by a proposed facility that, like National Fuel's, is less than ten miles in length. N.Y. Pub. Serv. Law § 121-a(7). Those five necessary findings are:

- (a) the basis of the need for the facility;
- (b) the nature of the probable environmental impact;
- (c) . . . that the location of the line will not pose an undue hazard to persons or property along the area traversed by the line;
- (d) that the location of the facility as proposed conforms to applicable state and local laws and regulations issued thereunder, all of which shall be binding upon the commission, except that the commission

may refuse to apply any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement which would be otherwise applicable if it finds that as applied to the proposed facility such is unreasonably restrictive in view of the existing technology, or of factors of cost or economics, or of the needs of consumers whether located inside or outside of such municipality.

(g) that the facility will serve the public interest, convenience, and necessity

N.Y. Pub. Serv. Law § 126(1).¹

Like the FERC proceeding, the PSC's application process involves the filing of supporting documentation by the applicant. Section 122 of the Public Service Law states that

[a]n applicant for a certificate shall file with the commission an application, in such form as the commission may prescribe, containing the following information: (a) the location of the site or right-of-way; (b) a description of the transmission facility to be built thereon; (c) a summary of any studies which have been made of the environmental impact of the project, and a description of such studies; (d) a statement explaining the need for the facility; (e) a descrip-

¹ Section 126(1)(d) applies only to electric transmission lines. Section 126(1)(c), although not applicable here, does affect gas lines longer than ten miles under Section 121-a(7). It requires a finding by the PSC: that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations including but not limited to, the effect on agricultural lands, wetlands, parklands and river corridors traversed.

N.Y. Pub. Serv. Law § 126(1)(c).

tion of any reasonable alternate location or locations for the proposed facility, a description of the comparative methods and detriments of each location submitted, and a statement of the reasons why the primary proposed location is best suited for the facility; and (f) such other information as the applicant may consider relevant or the commission may by regulation require. Copies of all the studies referred to in (c) above shall be filed with the commission and shall be available for public inspection.

N.Y. Pub. Serv. Law § 122(1). Gas lines extending less than ten miles and those extending less than five miles with a nominal diameter of six inches or less require the filing of somewhat abbreviated versions of the survey above. N.Y. Pub. Serv. Law §§ 121-a(2), 121-a(3).

For many years after enactment of Article VII, the PSC had never attempted to subject interstate pipeline construction to Article VII's regulatory scheme. In recent times, however, the PSC has attempted to assert authority over such construction. Anticipating an attempt by the PSC to review the National Fuel project at issue in the instant matter, National Fuel took the position that it did not need to seek a PSC certificate because Article VII was preempted by the various federal statutes and FERC regulations adopted pursuant to them. National Fuel therefore brought this action in the Northern District of New York seeking a declaratory judgment and an injunction against the PSC.

On cross-motions for summary judgment, the district court ruled in favor of the PSC and dismissed the complaint. Judge Munson held that even if the Natural Gas Act and the Natural Gas Pipeline Safety Act created an area preempted by FERC, that area is "pockmarked with

exceptions." Relying on Public Service Law Section 121(4), which states that Article VII "shall not apply to any major transmission facility . . . [o]ver which any agency or department of the federal government has exclusive jurisdiction, or has jurisdiction concurrent with that of the state and has exercised such jurisdiction, to the exclusion of regulation of the facility by the state," N.Y. Pub. Serv. Law §§ 121(4), 121(4)(c), Judge Munson held that Article VII could be applied in a way that would avoid encroaching on the FERC's jurisdiction. Finally, he held that Congress, in passing the various statutes in question, did not intend to preempt the states from maintaining their own environmental supervision of FERC-authorized projects. We disagree on all points.

DISCUSSION

The preemption doctrine is rooted in the Supremacy Clause of the Constitution, Article VI, clause 2, which states, "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Preemption exists under the Supremacy Clause where (i) Congress expressly intended to preempt state law, *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); (ii) there is actual conflict between federal and state law, *Free v. Bland*, 369 U.S. 663 (1962); (iii) compliance with both federal and state law is impossible, *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); (iv) there is implicit in federal law a barrier to state regulation, *Shaw v. Delta Air*

Lines, Inc., 463 U.S. 85 (1983); (v) Congress has "occupied the field" of the regulation, leaving no room for a state to supplement the federal law, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947); or (vi) the state statute forms an obstacle to the realization of Congressional objectives, *Hines v. Davidowitz*, 312 U.S. 52 (1941). See generally *Louisiana Pub. Serv. Comm'n v. Federal Communications Comm'n*, 476 U.S. 355, 368-69 (1986). Federal law need not be statutory to preempt state law. Regulations promulgated by an agency pursuant to its delegated authority may preempt similar state regulations. See *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984); *Fidelity Fed. Sav. & Loan Ass'n v. De la Cuesta*, 458 U.S. 141 (1982).

National Fuel's preemption argument rests on two theories. First, it argues that the Natural Gas Act was intended by Congress to vest exclusive jurisdiction in the FERC to regulate natural gas pipelines used in interstate commerce. Second, it asserts that a comparison of Article VII and the FERC regime demonstrates that Congress has fully occupied the field that the PSC would regulate. Given the considerable overlap of the two regulatory schemes and the delay or frustration of federally approved projects that would be the inevitable outcome of PSC proceedings regarding every interstate project, National Fuel's arguments seem facially overwhelming. To these arguments, however, the PSC offers an inventive response. Conceding *sub silentio* that FERC proceedings and the whole of Article VII cannot coexist, the PSC argues that Article VII may be applied piecemeal under Section 121(4)(c), which disclaims state jurisdiction where there is exclusive federal jurisdiction or concurrent federal jurisdiction that has been exercised. The PSC goes on to argue that the FERC does not conduct "site-specific" environmental review

and that such review is therefore neither a matter within exclusive federal jurisdiction nor a matter within concurrent federal jurisdiction that has been exercised. Such review, it is argued, may thus be the subject of PSC proceedings.

As to National Fuel's argument that Congress intended to vest exclusive jurisdiction to regulate pipelines in the FERC, a recent Supreme Court decision weighs heavily in National Fuel's favor. In *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S. Ct. 1145 (1988), the Court held 8-0 that a Michigan statute requiring natural gas companies to obtain approval from the Michigan Public Service Commission before issuing long-term securities was preempted by the Natural Gas Act. Writing for the Court, Justice Blackmun defined the preemption issue broadly as a question of "whether [the Michigan law] is a regulation of the rates and facilities of natural gas companies used in transportation and sale for resale of natural gas in interstate commerce." 108 S. Ct. at 1154. Finding that the Michigan law was such a regulation, the Court concluded that it was preempted. *See id.*

The PSC seeks to distinguish *Schneidewind* on the ground that the Michigan law in question, although it affected only the issuance of securities, "had as its central purpose[] the maintenance of [natural-gas companies'] rates at what the State considered a reasonable level," thereby encroaching upon the FERC's jurisdiction, Appellees' brief at 15 (quoting *Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kansas*, 109 S. Ct. 1262, 1275 n.10 (1989)). In contrast, it argues that site-specific environmental review has no such effect.

Schneidewind stated, however, that the FERC has exclusive authority over the "rates and facilities" of inter-

state gas pipelines. See 108 S. Ct. at 1151, 1154 (emphasis added). Even if we assume that the proposed PSC regulation would be limited to site-specific environmental review—an issue discussed *infra*—that review is undeniably a regulation of a facility used in the interstate transportation of natural gas. Such proceedings would certainly delay² and might well, by the imposition of additional requirements or prohibitions, prevent the construction of federally approved interstate gas facilities. Indeed, we were advised at oral argument that the PSC is prepared to use the threat of route-refusal or fines of \$100,000 per day against National Fuel in the event of non-compliance. In *Schneidewind*, the Court noted a similar “imminent possibility” of conflict in holding the Michigan statute preempted. See 108 S. Ct. at 1156; see also *Northern Natural Gas Co. v. State Corp. Comm’n of Kansas*, 372 U.S. 84, 91-93 (1963); *National Steel Corp. v. Long*, 689 F. Supp. 729, 738 (W.D. Mich. 1988). *Northwest Central Pipeline*, relied upon by the PSC, is not to the contrary. The Kansas law upheld there was found by the Court to be plausibly intended as a regulation of the “production or gathering” of natural gas, an area expressly preserved for the states by Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b). See 109 S. Ct. at 1275.

The validity of National Fuel’s second argument—that preemption may be inferred because Congress has occupied the field of regulation regarding interstate gas trans-

2 The PSC concedes that just such delays were visited upon *amicus curiae* Columbia Gas Transmission Corporation in an Article VII proceeding concerning an interstate gas facility. It argues, however, that those delays were caused by extraordinary and exceptional local opposition. We perceive no reason to expect that local opposition will be an exceptional event, particularly because there may generally be little local benefit from interstate facilities.

mission facilities—is also apparent. The overlap of the pertinent federal and state regulatory regimes is very substantial. For instance, an applicant for a PSC certificate of environmental compatibility and public need must satisfy the PSC regarding “the basis of the need for the facility,” and must show “that the facility *will serve the public interest, convenience, and necessity.*” N.Y. Pub. Serv. Law §§ 126(1)(a), 126(1)(g) (emphasis added). The FERC, meanwhile, will issue a certificate only if it finds that:

the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, *is or will be required by the present or future public convenience and necessity*; otherwise such application shall be denied.

15 U.S.C. § 717f(e) (emphasis added).

Article VII requires a finding by the PSC regarding “the nature of the probable environmental impact,” and, for lines longer than ten miles, requires a finding “that the facility represents the minimum adverse environmental impact” under the prevailing technological and economic circumstances. See N.Y. Pub. Serv. Law §§ 126(1)(b), 126(1)(c); *supra* note 1. The FERC also requires environmental information, including a statement of the factors considered in arriving at a given site proposal, a statement exploring the factors considered in proposing a route through scenic, historic, recreational or wildlife areas, 18 C.F.R. § 157.14(a)(6-b), a statement adopting the guidelines of 18 C.F.R. § 2.69 regarding the preservation of

scenic, historic, wildlife and recreational values, 18 C.F.R. § 157.14(a)(6-c), and an environmental impact statement in compliance with the NEPA. 18 C.F.R. § 380.3.

With regard to safety considerations, Article VII requires that the PSC determine "that the location of the line will not pose an undue hazard to persons or property along the area traversed by the line," and "that the location of the facility as proposed conforms to applicable state and local laws and regulations issued thereunder." N.Y. Pub. Serv. Law §§ 126(1)(e), 126(1)(f). The National Gas Pipeline Safety Act governs safety requirements for interstate gas transmission lines and expressly preempts more stringent regulation of such lines by state agencies. *See* 49 U.S.C. app. § 1672(a)(1).

The PSC does not deny that Article VII is substantially preempted by the FERC's regulatory authority. Instead, it argues that Section 121(4)(c), negating application of the Article to facilities "[o]ver which any agency or department of the federal government has exclusive jurisdiction, or has jurisdiction concurrent with that of the state and has exercised such jurisdiction, to the exclusion of regulation of the facility by the state," allows the PSC to pick and choose among Article VII's various requirements and to apply the Article piecemeal in each case to substantive areas it deems unregulated by the federal government.

We are not persuaded. Were we a New York state court, we would not hesitate to hold that Article VII is not amenable to piecemeal application. Article VII states that each of the five (in the case of longer pipelines, seven) requisite findings must be made by the PSC before a certificate will be issued. It thus makes no provision for issuance of a certificate when some but not other of the findings have been made. Similarly, the language of Section 121(4)(c) is most

easily read as a statement that Article VII is inapplicable in its entirety when federal authority has been exercised. Tellingly, moreover, the PSC itself appears for many years to have agreed that piecemeal application was not authorized and did not attempt to regulate pipelines carrying natural gas in interstate commerce until recently.

We are not a New York state court, however, and will not dwell on the meaning of Article VII because we believe that even if the PSC's present view is correct and piecemeal application of Article VII was intended by the New York legislature, Section 121(4)(c) is insufficient to preserve the authority asserted. As the PSC interprets it, Section 121(4) says no more than that the PSC should not exercise authority preempted under the Supremacy Clause. That Section does not purport to identify what portions of PSC authority under Article VII are viable or preempted in particular cases. Rather, once PSC proceedings begin, it can in its discretion attempt to exercise whatever portions of its regulatory authority it chooses, subject only to review by the New York courts with the possibility of discretionary review in the United States Supreme Court. Although its litigating posture in this case is to designate site-specific environmental review as its goal, Article VII offers no guidelines or directions preventing the PSC from attempting to exercise other aspects of its regulatory authority with regard to National Fuel's project. So-called piecemeal application of Article VII would thus allow the PSC to confront interstate transporters of gas with as much of the panoply of Article VII regulation as it chooses and to force them to litigate the preemption question issue by issue in state tribunals. Even if a transporter were ultimately successful before the PSC, the practical effect would be to undermine the FERC approval by imposing the costs and delays inherent in litigation that

must be undertaken without any guidelines as to limits on the exercise of state authority. If the PSC is correct, moreover, no state law, no matter how inconsistent with a federal law, would ever be facially preempted so long as it included a provision stating that the relevant state tribunals would abide by the Supremacy Clause, an obligation to which they are already bound.

Third, even if we assume that a small residue of valid PSC authority may exist, that the residue is easily identifiable, and that the PSC will forebear the exercise of the rest of its powers, the subject matter assertedly "saved" by Section 121(4)(c)—site-specific environmental review—is not New York's to save. The FERC expressly considered various data regarding the environmental effects of National Fuel's project before issuing a certificate of public convenience and necessity. National Fuel had to provide to the FERC a statement of factors considered in locating the facilities, including the possibility of using existing rights-of-way. It further provided a statement of factors considered in locating the facilities in scenic, historic, recreational or wildlife areas and the reasons for doing so. It had to provide yet another statement that it had followed federal guidelines minimizing adverse effects on scenic, historic, wildlife and recreational values. Finally, it had to submit an environmental impact statement to the FERC pursuant to NEPA.³ The PSC was free

3 The PSC argues strenuously that the fact that the environmental impact statement submitted to the FERC was required by NEPA rather than the Natural Gas Act somehow lessens the preemptive effect of the FERC's approval. We believe this argument is misplaced. As the text indicates, the FERC requires under its own authority extensive environmental data and considers that data in making its decision. It also considers the environmental impact statement required by NEPA. The decision is then made by the FERC, and whether NEPA itself preempts or does not preempt is simply irrelevant to the preemptive effect of that decision.

to intervene and present whatever contrary data it wished. It declined to do so.

The matters sought to be regulated by the PSC were thus directly considered by the FERC. Under *Schneidewind*, such direct consideration is more than enough to preempt state regulation. In that case, the Court invalidated a Michigan law that concerned a matter not explicitly considered by the FERC, namely the issuance of long-term securities, because the law affected a preempted area, namely rate-making. Here, we confront a state law concerning a matter explicitly considered by the FERC and affecting a preempted area.

Congress placed authority regarding the location of interstate pipelines—in the present case affecting citizens of four states in addition to New York—in the FERC, a federal body that can make choices in the interests of energy consumers nationally, with intervention afforded as of right to relevant state commissions. Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review. Allowing all the sites and all the specifics to be regulated by agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need, with the increased costs or lack of gas to be borne by utility consumers in other states.

Finally, the PSC argues that the FERC regulations themselves require that an applicant obtain certain state river crossing permits, *see* 18 C.F.R. Part 380, App. A., ¶ 9.1, and that the PSC is the authority responsible for the issuance of those permits. We need not pause to consider this argument in detail, because National Fuel's action seeks neither to relieve itself of the requirements of the

FERC certificate nor to avoid FERC regulation. To the extent that the PSC desires to challenge National Fuel's compliance with the FERC order, it may pursue whatever federal administrative and judicial remedies are available to compel that compliance. Similarly, to the extent that the PSC desires to enforce federal regulations through available federal administrative or judicial decisions, nothing in our present decision prevents it from doing so.

CONCLUSION

We reverse the decision of the district court and remand with instructions to enter judgment for National Fuel.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 89-7458.

UNITED STATES COURT OF APPEALS

FILED

JAN 24 1990

ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of January one thousand nine hundred and ninety.

Present: HON. WILLIAM H. TIMBERS,
HON. RALPH K. WINTER
HON. PETER K. LEISURE*, D.J.
Circuit Judges.

NATIONAL FUEL GAS
SUPPLY CORPORATION,
Plaintiff-Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE
OF NEW YORK, PETER A. BRADFORD, HAROLD
A. JERRY, JR., GAIL GARFIELD SCHWARTZ,
ELI M. NOAM, JAMES T. MCFARLAND,
EDWARD M. KRESKY, and HENRY G.
WILLIAMS, in their official capacity as
Commissioners of the Public Service Commission of
the State of New York,

Defendants-Appellees.

* Honorable Peter K. Leisure, United States District Judge for the Southern District of New York, sitting by designation.

Appeal from the United States District Court for the Northern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Northern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the Judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

ELAINE B. GOLDSMITH

Clerk

EDWARD J. GUARDARO

By: *Edward J. Guardaro*

Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
MAR 14 1990
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the fourteenth day of March, one thousand nine hundred and ninety.

Docket Number 89-7458.

NATIONAL FUEL GAS
SUPPLY CORPORATION,

Appellant,

v.

PUBLIC SERVICE COMMISSION OF THE STATE
OF NEW YORK, PETER A. BRADFORD, HAROLD
JERRY, GAIL SCHWARTZ, ELI NOAM, JAMES
McFARLAND, EDWARD KRESKY, and HENRY
WILLIAMS,

Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by appellees, Public Service Commission of the State of New York.

Upon consideration by the panel that heard the appeal,
it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in
banc has been transmitted to the judges of the court in
regular active service and to any other judge that heard
the appeal and that no such judge has requested that a
vote be taken thereon.

ELAINE B. GOLDSMITH

Elaine B. Goldsmith

Clerk

NOTICE OF MOTION

Docket Number 89-7458.

UNITED STATES COURT OF APPEALS
FILED
MAR 21 1990
ELAINE B. GOLDSMITH, CLERK
SECOND CIRCUIT

State type of motion: for clarification and stay

NATIONAL FUEL GAS SUPPLY CORP.,
v.
PUBLIC SERVICE COMMISSION.

Use short title

MOTION BY: *(Name, address and tel. no. of law firm
and attorney in charge of case)*

Jonathan D. Feinberg, Of Counsel
William J. Cowan, General Counsel
NYS Public Service Commission
Three Empire State Plaza
Albany, New York 12223

OPPOSING COUNSEL: *(Name, address and tel. no. of
law firm and of attorney in charge of case)*

Grant S. Lewis, Esq.
LeBoeuf, Lamb, Leiby & MacRae
520 Madison Avenue
New York, New York 10022

Has consent of opposing counsel:

- A. been sought? ☒ Yes ☐ No
 B. been obtained? ☐ Yes ☒ No
 Has service been effected? ☒ Yes ☐ No
 Is oral argument desired? ☐ Yes ☐ No

(Substantive motions only)

Requested return date:

(See Second Circuit Rule 27(b))

Has argument date of appeal been set:

- A. by scheduling order? ☐ Yes ☐ No
 B. by firm date of argument notice? ☐ Yes ☐ No
 C. If Yes, enter date: case argued 11/6/89

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL

Has request for relief been made below?

☐ Yes ☐ No

(See F.R.A.P. Rule 8)

Would expedited appeal eliminate need for this motion?

☐ Yes ☐ No

If No, explain why not:

Will the parties agree to maintain the status quo until the motion is heard?

☐ Yes ☐ No

Judge or agency whose order is being appealed:

Judge Munson, Northern District of New York

Brief statement of the relief requested:

Clarification of this Court's decision of January 24, 1990 with respect to its impact on various pending Article VII cases, and a stay pending an application for *certiorari*.

Complete Page 2 of This Form

By: *(Signature of attorney)*Appearing for: *(Name of party)*

JONATHAN D. FEINBERG

William J. Cowan,

Appellant or Petitioner:

Signed name must be
printed beneathGeneral Counsel
NYS Public Service
Commission☐ Plaintiff ☐ Defendant

Appellant or Respondent:

☐ Plaintiff ☒ Defendant

Jonathan D. Feinberg

Date

3/20/90

UNITED STATES COURT OF APPEALS

FILED

APR 27 1990

ELAINE B. GOLDSMITH, CLERK

SECOND CIRCUIT

ORDER

IT IS HEREBY ORDERED that the motion for clarification is denied; the motion for a stay is granted. The petition for writ of certiorari must be filed within 14 days of this order. If the petition is so filed, the stay will remain in effect until the Supreme Court disposes of this matter. If the petition is not so filed, the stay will expire 15 days after this order.

WILLIAM H. TIMBERS

RALPH K. WINTER

PETER K. LEISURE

4-27-90

Date

APPENDIX B

Decision of the United States District
Court for the Northern District of
New York, with Judgment

UNITED STATES DISTRICT COURT

Northern District of New York

Case Number: 88-CV-1182

NATIONAL FUEL GAS SUPPLY CORPORATION,

v.

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK, *et al.*

JUDGMENT IN A CIVIL CASE

- [] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- [x] Decision by Court. This action came to trial on hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the defendants' Motion for Summary Judgment is hereby granted and the complaint is DISMISSED in its entirety pursuant to the Order of the Hon. Howard G. Munson in open Court on April 7, 1989 at Syracuse, New York.

April 7th, 1989
Date Clerk

J. R. SCULLY, Clerk

COPY

(Illegible)

APR 7 1989

CRAIG B. MINOR
(By) Deputy Clerk

AT _____ O'CLOCK _____
J. R. SCULLY, Clerk
SYRACUSE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

88-CV-1182

NATIONAL FUEL GAS SUPPLY CORP.,
Plaintiff,

vs.

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK, *et al.,*
Defendants.

DECISION, held on April 7, 1989, at the United States Courthouse, Syracuse, New York, before the Honorable HOWARD G. MUNSON, United States District Court Judge, Northern District of New York.

APPEARANCES:

LeBOEUF, LAMB, LEIBY & MacRAE
For the Plaintiff, National Fuel
Gas Supply Corp.

BY: GRANT S. LEWIS, ESQ.,
Of Counsel

RONALD J. GIZZI, ESQ.,
Of Counsel

NATIONAL FUEL GAS SUPPLY CORPORATION
In-House Counsel
DAVID W. REITZ, ESQ.

PUBLIC SERVICE COMMISSION
For the Defendant
BY: JONATHAN D. FEINBERG, ESQ.

[2] THE COURT: While this would be a nice exercise to write a decision for you, I am going to decide this today from the Bench.

Let me say, first, usually when presented with cross-motions for summary judgment, some courts have assumed that no dispute could exist regarding material facts. This Court will make no such assumption. On the one hand, both parties indicate that only legal issues are presented in the motions at bar. On the other hand, both parties do dispute the reasons for a delay in a prior proceeding in which National Fuel sought a certification from the Public Service Commission. This factual dispute, though, is not material to the issues at bar. The delay itself may explain National Fuel's motive for instituting this action, however, it does not go to the issue of the breadth of preemption of federal law in the area of interstate pipelines.

Now, in general there are three situations in which a state law will be preempted by a federal law. Congress can expressly evince its intent to preempt state law with an express statement to the effect. Additionally, preemptive intent may be inferred when Congress legislates comprehensively, thus occupying an entire field of regulation. Finally, if Congress has not displaced state regulation [3] entirely, it may nonetheless preempt state law to the extent that the state law actually conflicts with federal law.

On the whole, National Fuel argues that Congress has completely occupied the "field" with respect to the regulation of interstate pipelines and the accompanying facilities. It also has brought to the Court's attention what it identifies as areas of conflict between federal law and Article VII. Finally, Plaintiff presents to the Court specific statutory language of preemption.

In resolving the question of preemption, the Court must consider a palmful of federal statutes, namely, the Natural Gas Act or NGA, the Natural Gas Pipeline Safety Act or Safety Act, and the National Environmental Policy Act or NEPA. In the main, Plaintiff contends that the NGA and the Safety Act, when taken together, preempt the field of regulation of interstate pipelines. However, if these two statutes do create a field of preemption, the field is pockmarked with exceptions.

By its own terms, the NGA permits the states to regulate intrastate transportation, local distribution, and distribution facilities and the production or gathering of natural gas. Thus, in a decision rendered on March 6, 1989, the United States Supreme Court decided that a Kansas regulation timing the production of natural gas in [4] Kansas did not violate the supremacy clause—and that is the *Northwest Central Pipeline Case* that was referred to earlier today. It has also been held that state law regulating retail sales of natural gas is not preempted. Additionally, it has been held that federal law regulating interstate pipelines does not preempt the application of state contract law to the interpretation of gas purchase contracts, and that was held in the *Pennzoil Case*, a Fifth Circuit case, v. the Federal Energy Regulatory Commission.

Now, the Plaintiff places great reliance on two Supreme Court cases. First of all, the Plaintiff has frequently cited the *Schneidewind Case* in which the Supreme Court held that Michigan could not require an interstate pipeline company to acquire the approval of a state agency prior to issuing long term securities. The Court reasoned that giving the state power to regulate the issuance of securities was unconstitutional because

the state statute in question impacted on, and was a regulation of, the rates of natural gas used in interstate commerce. Second, Plaintiff cites *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, another United States Supreme Court case, in support of its motion. In that case the Supreme Court struck down Kansas' attempt to compel interstate [5] pipeline companies who purchased natural gas in Kansas to purchase ratably from all wells. While these two decisions do exhibit that the FERC has extensive authority in regulating interstate gas pipelines, neither addresses whether federal law preempts a state from requiring an interstate pipeline company to seek environmental compatibility and local permit procurement at a state level.

The parties in their briefs have presented the Court with only one case which addresses whether state environmental regulations are preempted by the Safety Act and the NGA. The Court in its independent research has discovered no other case which addresses the question. The case presented by the parties is the *ANR Pipeline Co. v. Iowa State Commerce Commission*, 828 Fed. 2d 465. The language in that case on this point is dicta. In reviewing legislation which was challenged as preempted by the NGA and the Safety Act, the Court allowed that a state may enact legislation to protect its valuable topsoil and other aspects of the environment as long as the state regulations do not conflict with existing federal standards. The Court observed that certain federal regulations appear to anticipate such state regulation, citing what is now 18 C.F.R. Part 380 Appendix A, Sections 9.2 and 9.3.

Both parties agree that NEPA does not [6] preempt state law in the area of environmental regulation. FERC regulations do require that in applying for a FERC

certificate of public convenience and necessity, a pipeline company must submit information regarding the environmental impact of the proposed pipeline. NEPA is prominently mentioned in these regulations. Thus, the Court is of the opinion that a significant motivation for these environmentally oriented regulations is NEPA and not the NGA or the Safety Act. Concomitantly, then, these regulations would be less likely to preempt state efforts to regulate the environmental compatibility of pipeline construction.

Several factors reveal that Article VII can exist compatibly with the NGA and the Safety Act. First, Article VII states that it will not apply to any pipeline or facility over which the federal government has jurisdiction to the extent that federal jurisdiction is exercised to the exclusion of state jurisdiction. The state statute considered in *California Coastal Commission v. Granite Rock Company* at 480 U.S. 572 contained a similar clause. Both in that case and this one, then, the state statute can be "understood to allow the state agency to limit the regulations it will impose." While such a clause would not save from invalidation—originally, my Quaker Law Clerk wanted to [7] use the word perdition, but I will use invalidation—a statute which contains no provisions which were not preempted, it can underscore supremacy clause concerns which a legislature passes to a state agency enforcing a statute. With respect to interstate pipeline companies, the Public Service Commission concedes that it cannot enforce safety, rates, or general routing regulations. It appears that the Public Service Commission contemplates limiting the application of Article VII in a manner analogous to that contemplated by the Supreme Court in *California Coastal Commission*. As an additional matter, if the PSC does limit the application of Article

VII when reviewing applications of interstate pipeline companies, that would not render the remainder of Article VII a dead letter. Article VII also applies to intrastate pipelines and facilities; consequently, that which does not apply to interstate pipelines may remain viable because it is applicable to intrastate pipelines and facilities. Such a result would be compatible with federal legislation. As previously noted, the NGA permits states to regulate intrastate transportation of natural gas. The Safety Act permits the states, when regulating intrastate pipelines, to promulgate safety standards stricter than the federal standards.

National Fuel attempts to circumvent the clause in Article VII, which directs that the statute not be [8] applied in a manner encroaching on federal jurisdiction, by arguing that such flexibility is only permissible when the statute to be limited is vague in its requirements. Plaintiff maintains that Article VII is not as vague as the state statute before the Court in *California Coastal Commission*, and, therefore, may not be limited by the PSC. While Article VII may be more specific than the California statute before the Supreme Court, the Court concludes that it is not so specific as to preclude flexibility on the part of the PSC when administering it. Just as in the California case, Article VII does not delineate what standards will apply when the PSC reviews applications in connection with pipeline matters within the FERC jurisdiction. Additionally, if the Court were to accept Plaintiff's argument, it would have the undesirable result of penalizing the state for using specificity in statute drafting.

Another factor indicating compatibility of federal and state law in the case at bar is that the FERC regulations appear to contemplate state involvement. Thus under the

FERC's guidelines for preparation of environmental reports for applications under the NGA, the applicant must identify all necessary federal, regional, state and local permits. Furthermore, the applicant must identify all federal, regional, state and local safety and health [9] regulations and codes which must be complied with in the construction of interstate pipelines. National Fuel contends, however, that FERC can remove obtaining local permits as a condition for gaining a FERC certificate. This may be true, however, there is no indication whatsoever that FERC does this with regularity. In any event, in the case at bar the Court is presented with an action for declaratory judgment and the FERC has not removed the condition of seeking local permits with regard to the West Seneca pipeline.

National Fuel contends that the PSC may not maintain a separate application and proceeding regarding an interstate pipeline because state agencies may intervene in the FERC proceedings regarding an application for pipeline construction. The Supreme Court, though, in *California Coastal Commission* has held that the possibility of intervention by a state agency does not automatically render void a state regulatory scheme which impacts on the subject of an application before the federal agency. The federal statutes at issue here, and the statute examined in that section of the *California Coastal* opinion are materially different. Contrary to the statute being reviewed by the Supreme Court, the statutes involved here do not include language which indicates that Congress [10] did not intend the NGA or the Safety Act to be independent causes of federal preemption of state environmental law. In this situation then, this Court must search for other indications of the Congressional intent underlying the NGA and the Safety Act.

The NGA does not address environmental concerns. Although the preemption language in it could be construed broadly to the extent that any state regulation would be preempted because it would impact on rates, this Court refuses to go that far. As the recent holding in *Northwest Central Pipeline* indicates, not all state regulations impacting on wholesale prices are void under the supremacy clause.

The language of the Safety Act comes much closer to addressing environmental concerns than does the language of the NGA. Under the Safety Act, the states are expressly forbidden from regulating the safety standards of interstate pipelines. Thus a state may not direct a pipeline company to bury an interstate pipeline at a certain depth—again, *Northern Border Pipeline* which is a case in the Federal Supp. Neither may a state compel a pipeline company to formulate emergency procedures in the event of releases of noxious gases prior to permitting the company to construct a pipeline. That [11] was held in the Fifth Circuit in *Natural Gas Pipeline Company v. Railroad Commission of Texas*. These cases stand for the proposition that states may not prescribe safety standards for the operation or construction of pipelines. Left open to the states, however, is the opportunity to provide environmental guidelines which do not conflict with the federal safety standards. That is, when making an environmental review of a pipeline, the state must abide by and take into consideration the safety of construction and operation standards set by FERC.

The Court, for reasons articulated previously, concludes that Congress did not intend to preempt the states from conducting environmental compatibility review, or subjecting pipeline companies to the

procurement of local permits. Simply put, there is neither field preemption nor conflict. As noted earlier, FERC regulations do instruct an applicant to comply with state and local permit requirements. It is just at this stage, for example, applying for a permit to cross a river or a stream, that environmental review would be especially appropriate. From one standpoint, issuing local permits and performing a review of environmental compatibility, proceed hand in hand.

In making its challenge of Article VII, [12] National Fuel does not single out any one application of the statute. Instead, Plaintiff seeks a declaratory judgment that the Article is preempted by the supremacy clause. Plaintiff's burden in such an action is not an easy one for it must show that Article VII is preempted in all possible applications. As the preceding opinion indicates, that is, the *California Coastal Commission* opinion, Article VII is not preempted with regard to local permit procurement or with regard to a review of the environmental compatibility.

Defendants ask this Court to abstain from deciding the motions on the grounds that in deciding this question the Court may upset the state's regulatory scheme. The Court declines to abstain for several reasons. First, upsetting a regulatory scheme in and of itself, is not a sufficient basis for abstaining. Second, Plaintiff's challenge to Article VII is a facial challenge. In other words, it is of the view that the PSC cannot issue any regulations which will correct what it perceives as the federal preemption of Article VII. Finally, and in any event, the Court's decision does not upset a state regulatory scheme any more than would the position briefed by the regulatory agency itself.

Based on the above analysis, the Court [13] denies Plaintiff's motion for summary judgment, grants Defendants' motion for summary judgment, and dismisses the complaint.

This shall constitute the Order of the Court. The Clerk is directed to enter judgment in accordance with this opinion. All right, thank you, gentlemen.

COURT CLERK: Court stands adjourned.

END OF DECISION HELD ON APRIL 7, 1989.

* * *

APPENDIX C

**Orders of the Federal Energy
Regulatory Commission**

**UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION**

Docket No. CP86-292-000

Certificate

(construction and operation)

Abandonment

**National Fuel Gas Supply
Corporation**

**ORDER AUTHORIZING ABANDONMENT
AND ISSUING CERTIFICATE**

(Issued June 16, 1986)

On January 27, 1986, National Fuel Gas Supply Corporation (National Fuel) filed in Docket No. CP86-292-000 an application, as supplemented April 2, 1986, pursuant to Section 7 of the Natural Gas Act for permission and approval to abandon 1.78 miles of pipeline and a regulator station and for a certificate of public convenience and necessity authorizing the construction and operation of pipeline and a regulator station to replace the abandoned pipeline and regulator station, all located in the town of West Seneca, Erie County, New York, all as more fully set forth in the application.

National Fuel seeks authorization to replace a portion of its Line K in West Seneca consisting of 1.78 miles of 20-inch bare steel pipe, most of which was constructed in 1951 and 1953 and which traverses a residential area. The replacement segment, which traverses a shorter route, would consist of 1.61 miles of 20-inch coated steel pipe and would be routed along a power corridor, away

from existing residences. The southern most sections will cross two private properties and will require new rights-of-way. National Fuel states that this proposal represents its continued effort to relocate bare pipeline where it traverses residential areas.

In addition, National Fuel proposes to abandon a regulator station and delivery of natural gas to National Fuel Gas Distribution Corporation (Distribution), along the pipeline to be abandoned, and establish a new station and delivery point along the new pipeline.

National Fuel's service to existing customers will not be affected by the proposed abandonment and replacement. The existing pipeline will be abandoned in place while the existing regulator and delivery station will be dismantled.

The estimated cost of the proposed construction is \$556,000. These costs will be financed internally and/or interim short-term bank loans.

Based on the information provided in the application, the supplemental filing dated April 2, 1986, and the submission of cultural resources data for review and approval before commencement of the proposed replacement, approval of this proposal does not constitute a major Federal action significantly affecting the quality of the human environment.

Since the facilities are used or will be used in the transportation of natural gas in interstate commerce subject to the jurisdiction of the Commission, the abandonment thereof is subject to the requirements of Subsection (b) and the construction and operation thereof are subject to the requirements of Subsections (c) and (e) of Section 7 of the Natural Gas Act.

After due notice by publication in the *Federal Register* on February 26, 1986 (51 Fed. Reg. 6796), Distribution

filed a timely motion to intervene.¹ No further motions to intervene, notices of intervention, or protests to the granting of the application have been filed.

At a hearing held on June 12, 1986, there was received and made a part of the record in this proceeding all evidence, including the application and exhibits thereto, submitted in support of the authorization sought herein.

Pursuant to the authority delegated by 18 C.F.R. 375.307, *it is ordered*:

(A) Upon the terms and conditions of this order permission for and approval of the abandonment of the facilities and service, hereinbefore described and as more fully described in the application in this proceeding, are granted.

(B) National Fuel shall notify the Commission of the abandonment within ten days thereof.

(C) Upon the terms and conditions of this order, a certificate of public convenience and necessity is issued authorizing National Fuel to construct and operate the subject facilities and to deliver gas at the new delivery point, all as hereinbefore described and as more fully described in the application.

(D) The certificate issued by paragraphs (C) above and the rights granted thereunder are conditioned upon National Fuel's compliance with all applicable Commission Regulations under the Natural Gas Act and particularly the general terms and conditions set forth in Part 154 and in paragraphs (a), (c)(3), (c)(4), (e), and (g) of Section 157.20 of such Regulations.

EUGENE (ILLEGIBLE)
Raymond A. Bairns, Acting Director
Office of Pipeline and
Producer Regulation

¹ This motion to intervene is governed by operation of Rule 214.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. CP86-292-001

National Fuel Gas
Supply Corporation

ORDER AMENDING CERTIFICATE

(Issued July 5, 1988)

On October 19, 1987, National Fuel Gas Supply Corporation (National Fuel) filed in Docket No. CP86-292-001, a petition, as supplemented December 9, 1987, March 11, 1988, and May 4, 1988, to amend the order of June 16, 1986, issuing a certificate of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act, in Docket No. CP86-292-000, 35 FERC ¶62,490, so as to authorize the change of a pipeline route originally authorized, all as more fully set forth in the petition to amend.

National Fuel is currently authorized to replace 1.78 miles of pipeline (designated Line K) in Erie County, New York, with 1.61 miles of 20-inch coated steel line. Originally, the replacement segment was to be routed along a power corridor owned by Niagara Mohawk Power Corporation. However, because National Fuel was denied access to this corridor, it now proposes to install 1.45 miles of 20-inch line replacing 1.25 miles of line K, on a revised route that parallels more closely to its own, existing pipeline.

The estimated cost of the replacement pipeline is now estimated to be \$548,000.00. These costs will be financed internally and/or by interim short-term bank loans.

National Fuel's erosion and sediment control plan, filed with the Commission in a supplement to the original application, includes seed, mulch, and fertilizer specifications and water bar and ditch breaker spacings. National Fuel will also have to file for a renewal of its stream crossing and road crossing permits with the appropriate authorities.

Based on the information above and in the original application and instant amendment and the mitigating measures set forth in the supplemental filed on March 11, 1988, approval of the proposed abandonment in place of a pipeline and construction of a replacement pipeline would not constitute a major Federal action significantly affecting the quality of the human environment.

After due notice by publication in the *Federal Register* on November 3, 1987, 52 Fed. Reg. ¶42,336, National Fuel Gas Distribution Corporation filed a motion to intervene.¹ No further motions to intervene, notices of intervention or protests to the granting of the petition to amend have been filed.

Pursuant to the authority delegated by 18 CFR 375.307; it is ordered:

(A) The order of June 16, 1986, in Docket No. CP86-292-000 issuing a certificate of public convenience and necessity is amended in Docket No. CP86-292-001 so as to authorize the construction and operation of replacement pipeline along a modified route, all as hereinbefore described and as more fully described in the petition to amend. In all other respects, said order shall remain in full force and effect.

¹ Timely, unopposed motions to intervene are granted by operation of Rule 214.

(B) The authorization granted by paragraph (A) above and the rights granted thereunder are conditioned upon National Fuel's compliance with all applicable Commission Regulations under the National Gas Act and particularly the general terms and conditions set forth in paragraphs (a), (c)(3), (c)(4) and (e) of Section 157.20 of such Regulations.

(C) The facilities shall be constructed and placed into service within one year from the date of this order.

R. P. O'NEILL
Richard P. O'Neill, Director
Office of Pipeline and
Producer Regulation

APPENDIX D

Affidavit of Dana Roberts in Support
of Motion for Summary Judgment

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

Civil Action No. 88-CV-1182

NATIONAL FUEL GAS SUPPLY CORPORATION,

v.

PUBLIC SERVICE COMMISSION OF THE STATE
OF NEW YORK, PETER A. BRADFORD, HAROLD
A. JERRY, GAIL GARFIELD SCHWARTZ, ELI M.
NOAM, JAMES T. McFARLAND, EDWARD M.
KRESKY and HENRY G. WILLIAMS, in their
official capacity as Commissioners.

AFFIDAVIT IN SUPPORT OF MOTION
FOR SUMMARY JUDGMENT

MUNSON, C.J.

DANA ROBERTS, being duly sworn, deposes and
states as follows:

1. I am Chief of the Transmission Facilities Planning
and Certification Section of the Office of Energy
Conservation and Environment in the Department of
Public Service of the State of New York (Department).
My section has the primary responsibility for
administering Article VII of the Public Service Law.

2. I have been with the Department of Public Service since 1970. Prior to that date, I was employed by land use and transportation planning agencies in the states of Washington, California, Pennsylvania and New York. I hold a Bachelor of Arts degree from the University of Washington and received a Masters Degree in City and Regional Planning from the same institution in 1964.

3. The purpose of this affidavit is to explain the respective roles of the New York Department of Public Service (NYDPS) and the Federal Energy Regulatory Commission in regulating gas pipelines. As shown below, federal regulation does not totally occupy the field; there is no conflict between FERC and the NYDPS; and a preemption of Article VII's application to interstate gas pipelines would create a regulatory void that would leave unaddressed critical questions of state and local concern.

4. In reviewing interstate gas transmission facilities, FERC focuses principally on the need for the facility and its proposed route. FERC's staff encourages routes that fall within, or border, existing roadways, railways or utility rights-of-way and avoid specific designated resources. The staff also assures itself that proposed lines will be built in accord with each applicant's FERC-approved generic erosion and sedimentation control plans. Those generic plans give applicants a choice of erosion techniques to be used when the applicant believes such techniques are appropriate. It is important to recognize that FERC seldom certifies a center-line specific route, but simply authorizes construction within a corridor.

5. Under Article VII of the Public Service Law, the DPS staff performs several key functions not addressed by federal law. First, in contrast to the pre-Article VII days when developers had to obtain permits from

numerous state and local agencies, Article VII offers developers a "one-stop" forum for stream, roadway, wetland and other normally-required crossing permits and local land-use and zoning approvals. Of course, in issuing such permits, the Department's staff must assure itself that the actual construction reasonably safeguards the environment. Thus, while the New York Public Service Commission (the Department's decision-making body) takes the FERC approved corridor as a given, it may require a pipeline company to move its line, within the borders of the corridor, in a manner that accommodates state and local concerns for streams, wetlands, farmland and the like.

6. To insure that the actual construction of Article VII facilities complies with the Commission's environmental requirements, the PSC requires an Environmental Management and Construction Plan (EM&CP). Unlike the generic erosion and sedimentation control methods ordered by FERC, the EM&CP details specific construction and restoration practices, including, but not limited to, soil preservation techniques, and directs where specific methods are to be applied along the mapped route. That is, the EM&CP requires applicants to use particular techniques to retain and preserve soil at discrete sites on the right-of-way (R/W). It further specifies, among many other things: (1) double-ditching practices in agricultural areas [which ensure that topsoil is replaced over the backfill in a pipeline trench in order to maintain productivity]; (2) the methods for clearing R/W vegetation, digging trenches and disposing of slash [cut limbs and twigs], logs, boulders and shot rock [leftover fragments from blasting]; (3) the locations of access roads, and; (4) R/W restoration practices and procedures. Additionally, the Department examines the long-term management of the pipeline R/W

to ensure that an environmentally beneficial, yet cost-conscious, vegetation maintenance program is followed. Such a management program prevents vegetation from interfering with the operation and safety-monitoring of a line.

7. New York State's regulation of interstate gas transmission lines does not in any way conflict with FERC's regulation because we address different issues. Indeed, in accordance with our responsibility under state law to avoid conflicts with FERC's regulation, the Commission is currently "fine-tuning" New York State's share of the dual regulatory system and assuring continued compatibility with FERC jurisdiction in the context of Article VII hearings on a particular interstate pipeline project.

8. By no stretch of the imagination can it be said that complying with the Commission's orders under Article VII diminishes a pipeline company's ability to comply with FERC's orders. Indeed, the systems are symbiotic; New York State's "one-stop" permit process generally accelerates construction of interstate gas transmission lines. National Fuel's objections to the Article VII process are difficult to understand because it has previously filed three other Article VII applications, and received certificates in less than 60 days. For the West Seneca pipeline NFG has had to approach various agencies for individual permits instead of applying for a Commission certificate. To preempt application of Article VII would, on the other hand, create a regulatory gap, inasmuch as local concerns about road, stream and wetland crossings would not be addressed, and pipelines would not be required to accommodate local concerns in the siting process.

WHEREFORE, the Public Service Commission's
Motion for Summary Judgment should be granted.

DANA ROBERTS

Dana Roberts

Sworn to before me on this 13th day of February,
1989.

JONATHAN D. FEINBERG

Jonathan D. Feinberg

Notary Public, State of New York

Qualified in Albany County

No. 4785164

Commission Expires February 28, 1990

APPENDIX E

Public Service Law of the State of New York, Article VII
—Siting of Major Utility Transmission Facilities

PUBLIC SERVICE LAW OF THE STATE OF NEW YORK

ARTICLE VII—SITING OF MAJOR UTILITY
TRANSMISSION FACILITIES

Section

- 120. Definitions.
- 121. Certificate of environmental compatibility and public need.
- 121-a. Procedures with respect to certain fuel gas transmission lines.
- 122. Application for a certificate.
- 123. Hearing on application for certificate.
- 124. Parties to certification proceedings.
- 125. Conduct of the hearing.
- 126. The decision.
- 127. Opinion to be issued with decision.
- 128. Judicial review.
- 129. Jurisdiction of courts.
- 130. Powers of municipalities and state agencies.

§ 120. Definitions

Where used in this article, the following terms, unless the context otherwise requires, shall have the following meanings.

1. "Municipality" means a county, city, town or village in the state.

2. "Major utility transmission facility" means: (a) an electric transmission line of a design capacity of one hundred twenty-five kilovolts or more extending a distance of one mile or more, or of one hundred kilovolts or more and less than one hundred twenty-five kilovolts, extending a distance of ten miles or more, including associated equipment, but shall not include any such transmission line located wholly underground in a city with a population in excess of one hundred twenty-five thousand or a primary transmission line approved by the federal energy regulatory commission in connection with a hydro-electric

facility; and (b) a fuel gas transmission line extending a distance of one thousand feet or more to be used to transport fuel gas at pressures of one hundred twenty-five pounds per square inch or more, excluding appurtenant facilities, but shall not include any such transmission line which is located wholly underground in a city or wholly within the right of way of a state, county or town highway or village street as those terms are defined in article one of the highway law and article six of the village law, or which replaces an existing transmission line, including appurtenant facilities, and extends a distance of less than one mile.

3. "Person" means any individual, corporation, public benefit corporation, political subdivision, governmental agency, municipality, partnership, co-operative association, trust or estate.

4. "Appurtenant facilities" means installation (excluding gas compressors) which are merely auxiliary or appurtenant to a fuel gas transmission line such as: valves; drips; measuring and regulating equipment; yard and station piping; cathodic protection equipment; gas cleaning; cooling and dehydration equipment; residual refining equipment; water pumping; treatment and cooling equipment; electrical and communication equipment; and buildings.

(Added L.1970, c. 272, § 2; amended L.1972, c. 461, § 1; L.1981, c. 538, §§ 1,2.)

§ 121. Certificate of environmental compatibility and public need

1. No person shall, after July first, nineteen hundred seventy, commence the preparation of the site for the construction of a major utility transmission facility in the state without having first obtained a certificate of environmental compatibility and public need (hereafter in this article called a "certificate") issued with respect to such facility by the commission. The replacement of existing with like facilities, as determined by the commission, shall not constitute the construction of a major utility transmission facility. Any facility with respect to which a

certificate is required shall thereafter be built, maintained and operated in conformity with such certificate and any terms, limitations or conditions contained therein. A certificate may only be issued pursuant to this article.

2. A certificate may be transferred, subject to the approval of the commission, to a person who agrees to comply with the terms, limitations and conditions contained therein.

3. A certificate issued hereunder may be amended as herein provided.

4. This article shall not apply to any major utility transmission facility:

a. For which, on or before July first, nineteen hundred seventy an application has been made for a license, permit, consent or approval from any federal, state or local commission, agency, board or regulatory body, in which application the location of the major utility transmission facility has been designated by the applicant;

b. The construction of which has been approved by a municipality or public benefit corporation which has sold bonds or bond anticipation notes on or before July first, nineteen hundred seventy, the proceeds or part of the proceeds of which are to be used in payment therefor; or

c. Over which any agency or department of the federal government has exclusive jurisdiction, or has jurisdiction concurrent with that of the state and has exercised such jurisdiction, to the exclusion of regulation of the facility by the state.

5. Any person intending to construct a major utility transmission facility excluded from this article pursuant to subdivision four may elect to waive such exclusion by delivering notice of such waiver to the commission. This article shall thereafter apply to each major utility transmission facility identified in such notice from the date of its receipt by the commission.

(Added L.1970, c. 272, § 2, eff. July 1, 1970.)

§ 121-a. Procedures with respect to certain fuel gas transmission lines

1. All persons who intend to construct fuel gas transmission lines as described in this section shall file with the commission for its approval the standards and practices which will be applied to environmental management and construction of all such lines or shall file a certified statement agreeing to construct such lines in accordance with standards and practices on file and approved by the commission.

2. A notice of intention to construct a fuel gas transmission line as described in subdivision two of section one hundred twenty, which extends a distance of less than five miles and which is six inches or less in nominal diameter, shall be filed with the commission and shall contain:

(a) the date on or about which the applicant intends to begin construction of the line;

(b) a brief statement describing and locating the line;

(c) an indication of the approved environmental management and construction standards and practices that will be followed in an effort to minimize or avoid adverse environmental impacts to the maximum extent practicable.

A copy of such notice shall be served on each municipality in which any portion of such line is to be located and proof of service shall accompany the notice filed with the commission.

3. An application to construct a fuel gas transmission line as described in subdivision two of section one hundred twenty, which extends a distance of less than ten miles, other than a line described in subdivision two of this section, shall be filed with the commission and shall contain:

(a) the information required by paragraphs (a), (b), (d) and (f) of subdivision one hundred twenty-two;

(b) the description of the ecosystem, land use, visual and cultural resources which would be affected by the line; and

(c) an indication of the approved environmental management and construction standards and practices that will be followed in an effort to minimize or avoid adverse environmental impacts to the maximum extent practicable.

A copy of such application shall be served on: (i) the department of environmental conservation; (ii) the department of agriculture and markets; and (iii) each municipality in which any portion of such line is to be located; and proof of service shall accompany the application filed with the commission. The commission shall serve a copy of such application on such other person or entities as the commission may deem appropriate. Such action shall be deemed compliance with the applicable provisions of section one hundred twenty-two of this article. The applicant, the commission and those served shall constitute the parties notwithstanding the provisions of section one hundred twenty four.

4. If the notice or the application filed pursuant to subdivisions two or three of this section respectively does not comply with the requirements of such subdivision, the commission or its designee shall, promptly, but in no event more than fourteen days from the date on which it receives the notice or application, advise the person in writing of non-compliance and how to comply.

5. Any person may file comments on an application with the commission. The record of the certification proceeding under subdivision seven may be limited to the application, any comments filed by the parties and any report prepared by the staff of the department of public service, whether or not it acts as a party.

6. Upon receipt of a notice with respect to a fuel gas transmission line that complies with subdivision two of this section, the commission shall, within thirty days or less, determine whether there is a substantial public interest requiring that the facility

be reviewed in accordance with the provisions of subdivision seven of this section. If the commission determines that such review is not required it shall issue a certificate authorizing such construction. Failure to act within such thirty day period shall constitute a certificate for the purpose of this article. If the commission determines that such review is required, the commission shall serve a copy of the notice which shall constitute the application, on such person or entities as the commission may deem appropriate and which shall be deemed compliance with the applicable provisions of section one hundred twenty-two of this article. The applicant and such persons or entities shall constitute the parties, the provisions of second one hundred twenty-four notwithstanding.

7. The commission shall render a decision upon the record within sixty days from the date on which it receives an application complying with subdivision three or within sixty days from the date on which it receives a notice complying with subdivision two on which it has made a determination that review under this subdivision is in the public interest. Where the commission has required a hearing it may extend the time required to render a decision. In rendering its decision on a notice filed pursuant to subdivision two and reviewed under this subdivision, the commission is required to find and determine only that the construction of a fuel gas transmission line will minimize or avoid adverse environmental impacts to the maximum extent practicable. In rendering its decision on an application filed pursuant to subdivision three, the commission shall make only the determinations required by paragraphs (a), (b), (e), (f) and (g) of subdivision one of section one hundred twenty-six.

(Added L.1981, c. 538, § 3.)

§ 122. Application for a certificate

1. An applicant for a certificate shall file with the commission an application, in such form as the commission may prescribe, containing the following information: (a) the location of the site or right-of-way; (b) a description of the transmission facility to be built thereon; (c) a summary of any studies

which have been made of the environmental impact of the project, and a description of such studies; (d) a statement explaining the need for the facility; (e) a description of any reasonable alternate location or locations for the proposed facility, a description of the comparative merits and detriments of each location submitted, and a statement of the reasons why the primary proposed location is best suited for the facility; and (f) such other information as the applicant may consider relevant or the commission may by regulation require. Copies of all the studies referred to in (c) above shall be filed with the commission and shall be available for public inspection.

2. Each application shall be accompanied by proof of service of:

(a) a copy of such application on _____

i. each municipality in which any portion of such facility is to be located, both as primarily proposed and in the alternative locations listed. Notice to a municipality shall be addressed to the chief executive officer thereof and shall specify the date on or about which the application is to be filed;

ii. the commissioner of environmental conservation, the commissioner of commerce, the secretary of state, the commissioner of agriculture and markets and the commissioner of parks, recreation and historic preservation;

iii. each member of the legislature through whose district the facility or any alternate proposed in the application would pass;

iv. in the event such facility or any portion thereof is located within its jurisdiction, the St. Lawrence-eastern Ontario commission.

v. in the event such facility or any portion thereof is located with the Adirondack park, as defined in subdivision one of section 9-0101 of the environmental conservation law, the Adirondack park agency.

(b) a notice of such application on persons residing in municipalities entitled to receive notice under subparagraph i. of paragraph a. Such notice shall be given by the publication of a summary of the application and the date on or about which it will be filed, to be published under regulations to be promulgated by the commission, in such form and in such newspapers as will serve substantially to inform the public of such application.

3. Inadvertent failure of service on any of the municipalities, persons, agencies, bodies or commissions named in subdivision two may be cured pursuant to regulations of the commission designed to afford such persons adequate notice to enable them to participate effectively in the proceeding. In addition, the commission may, after filing, require the applicant to serve notice of the application or copies thereof or both upon such other persons and file proof thereof as the commission may deem appropriate.

4. An application for an amendment of a certificate shall be in such form and contain such information as the commission shall prescribe. Notice of such an application shall be given as set forth in subdivision two.

(Added L.1970, c. 272, § 2; amended L.1970, c. 273, § 1; L.1972, c. 827, § 9; L.1973, c. 348, § 2; L.1975, c. 464, § 28; L.1978, c. 119, § 1; L.1987, 362, §§ 1 to 3.)

§ 123. Hearing on application for certificate

1. Upon the receipt of an application with respect to an electric transmission line that complies with section one hundred twenty-two, the commission shall promptly fix a date for the commencement of a public hearing thereon not less than sixty nor more than ninety days after such receipt. Except as otherwise provided in section one hundred twenty-one-a of this article upon the receipt of an application with respect to a fuel gas transmission line that complies with section one hundred twenty-two, the commission shall promptly fix a date for the commencement of a public hearing thereon not less than twenty nor more than sixty days after such receipt. The testimony presented at

such hearing may be presented in writing or orally, provided that the commission may make rules designed to exclude repetitive, redundant or irrelevant testimony. The commission shall make a record of all testimony in all contested hearings.

2. On an application for an amendment of a certificate, the commission shall hold a hearing in the same manner as a hearing is held on an application for a certificate if the change in the facility to be authorized would result in any material increase in any environmental impact of the facility or a substantial change in the location of all or a portion of such facility other than as provided in the alternates set forth in the application.

(Added L.1970, c. 272, § 2; amended L.1981, c. 538, § 4.)

§ 124. Parties to certification proceedings

1. The parties to the certification proceedings shall include:

- (a) the applicant.
- (b) the department of environmental conservation.
- (c) the department of commerce.
- (d) the secretary of state.
- (e) the department of agriculture and markets.
- (f) the office of parks, recreation and historic preservation.

(g) where the facility or any portion thereof or of any alternate is to be located within its jurisdiction, the St. Lawrence-eastern Ontario commission.

(h) where the facility or any portion thereof or any alternate is to be located within the Adirondack park, as defined in subdivision one of section 9-0101 of the environmental conservation law, the Adirondack park agency.

(i) a municipality entitled to receive notice under paragraph (a) of subdivision two of section one hundred twenty-two, if it has filed with the commission a notice of intent to be a party, within thirty days after the date given in the notice as the date for filing of the application.

(j) any individual resident in a municipality entitled to receive notice under paragraph (a) of subdivision two of section one hundred twenty-two, if he has filed with the commission a notice of intent to be a party, within thirty days after the date given in the published notice as the date for filing of the application.

(k) any domestic non-profit corporation or association, formed in whole or in part to promote conservation or natural beauty, to protect the environment, personal health or other biological values, to preserve historical sites, to promote consumer interests, to represent commercial and industrial groups or to promote the orderly development of the areas in which the facility is to be located, if it has filed with the commission a notice of intent to become a party, within thirty days after the date given in the published notice as the date for filing of the application.

(l) such other persons or entities as the commission may at any time deem appropriate.

2. The commission shall designate such members of its staff as may be desirable to represent the public interest in such proceedings.

3. Any person may make a limited appearance in the proceeding, entitling such person to file a statement in writing, by filing a copy of such statement within sixty days after the date given in the published notice as the date for filing the application. All papers and matters filed by a person making a limited appearance shall become part of the record. No person making a limited appearance shall be party or shall have the right to present oral testimony or cross-examine witnesses or parties.

4. The commission may, for good cause shown, permit a municipality entitled to become a party under subdivision one, but which has failed to file the requisite notice of intent within

the time required, to become a party, and to participate in all subsequent stages of the proceeding.

5. Notwithstanding the time limits set forth in paragraphs (i), (j) and (k) of subdivision one and in subdivision three of this section, a person shall file the notice or statement described in those subdivisions within fifteen days after the date given in the published notice as the date for filing the application, when the application is one with respect to a fuel gas transmission line as defined in section one hundred twenty.

(Added L.1970, c. 272, § 2; amended L.1970, c. 273, § 2; L.1972, c. 827, § 10; L.1973, c. 348, § 3; L.1975, c. 464, § 29; L.1978, c. 119, § 2; L.1981, c. 538, § 5; L.1987, c. 362, §§ 1, 4.)

§ 125. Conduct of the hearing

A record shall be made of the hearing and of all testimony taken and the cross-examinations thereon. The rules of evidence applicable to proceedings before a court shall not apply. The commission may provide for the consolidation of the representation of parties, other than governmental bodies or agencies, having similar interests.

(Added L.1970, c. 272, § 2, eff. July 1, 1970.)

§ 126. The decision

1. The commission shall render a decision upon the record either granting or denying the application as filed or granting it upon such terms, conditions, limitations or modifications of the construction or operation of the facility as the commission may deem appropriate. If the commission denies the application, it shall file, with its order, an opinion stating in full its reasons for the denial. Except as provided in subdivision two of this section, the commission may not grant a certificate for the construction or operation of a major utility transmission facility, either as proposed or as modified by the commission, unless it shall find and determine:

(a) the basis of the need for the facility;

(b) the nature of the probable environmental impact;

(c) that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations including but not limited to, the effect on agricultural lands, wetlands, parklands and river corridors traversed;

(d) in the case of an electric transmission line, (1) what part, if any, of the line shall be located underground; (2) that such facility conforms to a long-range plan for expansion of the electric power grid of the electric systems serving this state and interconnected utility systems, which will serve the interests of electric system economy and reliability;

(e) in the case of a gas transmission line, that the location of the line will not pose an undue hazard to persons or property along the area traversed by the line;

(f) that the location of the facility as proposed conforms to applicable state and local laws and regulations issued thereunder, all of which shall be binding upon the commission, except that the commission may refuse to apply any local ordinance, law, resolution or other action or any regulation issued thereunder or any local standard or requirement which would be otherwise applicable if it finds that as applied to the proposed facility such is unreasonably restrictive in view of the existing technology, or of factors of cost or economics, or of the needs of consumers whether located inside or outside of such municipality.

(g) that the facility will serve the public interest, convenience, and necessity, provided, however, that a determination of necessity made by the power authority of the state of New York pursuant to section ten hundred five of the public authorities law for a major utility transmission facility for which an application has been filed prior to July first, nineteen hundred seventy-eight pursuant to section one hundred twenty-two of this chapter, shall be conclusive on the commission.

2. In the case of an electric transmission line to be constructed by the power authority of the state of New York and located in part under the waters of Long Island Sound and for the remaining part underground, the commission shall make only the findings and determinations required by paragraphs (b), (c) and (f) of subdivision one of this section and, on the basis of such findings and determinations, shall grant, grant in part, or deny the certificate.

3. If the commission determines that the location of all or a part of the proposed facility should be modified, it may condition its certificate upon such modification, provided that the municipalities and persons residing in such municipalities affected by the modification shall have had notice of the application as provided in subdivision two of section one hundred twenty-two.

4. A copy of the order and any opinion issued therewith pursuant to section one hundred twenty-seven shall be served upon each party.

(Added L.1970, c. 272, § 2; amended L.1978, c. 760, § 1; L.1984, c. 520, §§ 1, 2; L.1987, c. 406, § 1.)

§ 127. Opinion to be issued with decision

In rendering a decision on an application for a certificate, the commission may issue an opinion stating its reasons for the action taken. If the commission has found that any local ordinance, law, resolution, regulation, or other action issued thereunder or any other local standard or requirement which would be otherwise applicable is unreasonably restrictive pursuant to paragraph b of subdivision one of section one hundred twenty-six, it shall state in its opinion the reasons therefor.

(Added L.1970, c. 272, § 2, eff. July 1, 1970.)

§ 128. Judicial review

1. Any party aggrieved by any order issued on an application for a certificate may apply for a rehearing under section

twenty-two within thirty days after issuance of the order and thereafter obtain judicial review of such order in a proceeding as provided in this section. Such proceeding shall be brought in the appellate division of the supreme court of the state in the judicial department embracing the county wherein the proposed facility is located. If such facility is located in more than one judicial department, such proceeding may be brought in any one but only one of such departments. Such proceeding shall be initiated by the filing of a petition in such court within thirty days after the issuance of a final order by the commission upon the application for rehearing, together with proof of service of a demand on the commission to file with said court a copy of a written transcript of the record of the proceeding before it and a copy of its order and opinion, if any. The commission's copy of said transcript, order and opinion, if any, shall be available at all reasonable times to all parties for examination without cost. Upon receipt of such petition and demand, the commission shall forthwith deliver to the court a copy of the record and a copy of its order and opinion, if any. Thereupon the court shall have jurisdiction of the proceeding and shall have power to grant such relief as it deems just and proper, and to make and enter an order enforcing, modifying, and enforcing as so modified, remanding for further specific evidence or findings or setting aside in whole or in part such order. The appeal shall be heard on the record without requirement of reproduction. No objection that has not been urged by the party in his application for rehearing before the commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of fact on which such order is based shall be conclusive if supported by substantial evidence on the record considered as a whole or by information set forth in the opinion. The jurisdiction of the appellate division of the supreme court shall be exclusive and its judgment and order shall be final, subject to review by the court of appeals in the same manner and form and with the same effect as provided for appeals in a special proceeding. All such proceedings shall be heard and determined by the appellate division of the supreme court and

by the court of appeals as expeditiously as possible and with lawful precedence over other matters.

2. The grounds for and the scope of review of the court shall be limited to whether the order of the commission and opinion, if any, is

(a) in conformity with the constitution and the laws of the state and the United States.

(b) supported by substantial evidence in the record or by information properly considered in the opinion.

(c) within the commission's statutory jurisdiction or authority.

(d) made in accordance with procedures set forth in this article or established by rule or regulation of the commission.

(e) arbitrary, capricious or an abuse of discretion.

3. Except as herein provided article seventy-eight of the civil practice law and rules shall apply to appeals taken hereunder.

(Added L.1970, c. 272, § 2, eff. July 1, 1970.)

§ 129. Jurisdiction of courts

Except as expressly set forth in section one hundred twenty-eight and except for review by the court of appeals of a decision of the appellate division of the supreme court as provided for therein, no court of this state shall have jurisdiction to hear or determine any matter, case or controversy concerning any matter which was or could have been determined in a proceeding under this article or to stop or delay the construction or operation of a major facility except to enforce compliance with this article or the terms and conditions of a certificate issued hereunder.

(Added L.1970, c. 272, § 2, eff. July 1, 1970.)

§ 130. Powers of municipalities and state agencies

Notwithstanding any other provision of law, no state agency, municipality or any agency thereof may require any approval, consent, permit, certificate or other condition for the construction or operation of a major facility with respect to which an application for a certificate hereunder has been issued, other than those provided by otherwise applicable state law for the protection of employees engaged in the construction and operation of such facility, and provided that in the case of a municipality or an agency thereof, such municipality has received notice of the filing of the application therefor.

Neither the St. Lawrence-eastern Ontario commission nor the Adirondack park agency shall hold public hearings for a major utility transmission facility with respect to which an application hereunder has been filed, provided that such commission or agency has received notice of the filing of such application.

(Added L.1970, c. 272, § 2; amended L.1973, c. 348, § 4; L.1987, c. 362, § 5.)

APPENDIX F

Excerpts from Chapter 15B—National
Gas Act—15 U.S.C. §§717-7170

CHAPTER 15 B. NATURAL GAS ACT - 15 U.S.C. §§ 717-7170

Sec.

717. Necessity for regulation of natural gas companies.

717a. Definitions.

717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing.

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(c) Certificate of public convenience and necessity.

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(e) Granting of certificate of public convenience and necessity.

(f) Determination of service area; jurisdiction of transportation to ultimate consumer.

(g) Certificate of public convenience and necessity for service of area already being served.

(h) Right of eminent domain for construction of pipelines, etc.

717o. Administrative powers of Commission; rules, regulations and orders.

§ 717. Necessity for regulation of natural gas companies

(a) As disclosed in reports of the Federal Trade Commission made pursuant to S.Res. 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in

interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

(c) The provisions of this chapter shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters exempted from the provisions of this chapter by this subsection are declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction.

June 21, 1938, c. 556, § 1, 52 Stat. 821; Mar. 27, 1954, c. 115, 68 Stat. 36.

§ 717a. Definitions

When used in this chapter, unless the context otherwise requires —

- (1) "Person" includes an individual or a corporation.
- (2) "Corporation" includes any corporation, joint-stock company, partnership, association, business trust, organized group of persons, whether incorporated or not, receiver or receivers, trustee or trustees of any of the foregoing, but shall not include municipalities as hereinafter defined.

(3) "Municipality" means a city, county, or other political subdivision or agency of a State.

(4) "State" means a State admitted to the Union, the District of Columbia, and any organized Territory of the United States.

(5) "Natural gas" means either natural gas unmixed, or any mixture of natural or artificial gas.

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

(7) "Interstate commerce" means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States.

(8) "State commission" means the regulatory body of the State or municipality having jurisdiction to regulate rates and charges for the sale of natural gas to consumers within the State or municipality.

(9) "Commission" and "Commissioner" means the Federal Power Commission, and a member thereof, respectively.

June 21, 1938, c. 556, § 2, 52 Stat. 821.

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or

legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that

time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumer

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) **Certificate of public convenience and necessity for service of area already being served**

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) **Right of eminent domain for construction of pipelines, etc.**

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds \$3,000.

June 21, 1938 c. 556, § 7, 52 Stat. 824; Feb. 7, 1942, c. 49, 56 Stat. 83; July 25, 1947, c. 333, 61 Stat. 459.

(As amended Nov. 9, 1978, Pub.L. 95-617, title VI, § 608, 92 Stat. 3173; Oct. 6, 1988, Pub.L. 100-474, § 2, 102 Stat. 2302.)

§ 717o. **Administrative powers of Commission; rules, regulations, and orders**

The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders,

rules and regulations as it may find necessary or appropriate to carry out the provisions of this chapter. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this chapter; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

June 21, 1938, c. 556, § 16, 52 Stat. 830.

APPENDIX G**Excerpts from Title 18 of the
Code of Federal Regulations**

§2.69 Guidelines to be followed by natural gas pipeline companies in the planning, locating, clearing and maintenance of rights-of-way and the construction of aboveground facilities.

(a) In the interest of preserving scenic, historic, wildlife and recreational values, the construction and maintenance of facilities authorized by certificates granted under section 7(c) of the Natural Gas Act should be undertaken in a manner that will minimize adverse effects on these values. Accordingly, the Commission believes that the planning, locating, clearing and maintenance of rights-of-way and the construction of aboveground facilities should, as a general practice, conform to the guidelines set forth below. The National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat. 852, title I, section 1092 thereof, directs agencies of the Federal Government to utilize a systematic, interdisciplinary approach which will insure integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment. Congress has declared as a national policy the critical importance of restoring and maintaining environmental quality and directed that all practicable means be used to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social and economic requirements of present and future generations of Americans. There is increasing need to fit the construction of pipeline facilities into an overall plan for land development and use in Federal, State, and regional land use planning and development. While these guidelines would require

greater advance planning and earlier filing of applications than has been the past practice, it is clear that such earlier planning and filing would generally result in minimizing the time delay caused by considering location as part of an overall plan for land development and use. To the extent landowners may have special interests concerning the planning, locating, clearing and maintenance of rights-of-way and the construction of aboveground facilities on their property, those desires may be taken into account by natural gas companies so long as the result is consistent with local laws relating to land use. These guidelines do not affect an applicant's obligation to comply with the applicable safety regulations of the Department of Transportation, pursuant to the Natural Gas Pipeline Safety Act of 1968.

(1) *Pipeline construction.* (i) In locating proposed facilities, consideration should be given to the utilization, enlargement or extension of existing rights-of-way belonging to either applicant or others, such as pipelines, electric powerlines, highways, and railroads.

(ii) Where practical, rights-of-way should avoid the national historic places listed in the National Register of Historic Places and natural landmarks listed in the National Register of Natural Landmarks maintained by the Secretary of the Interior, and parks, scenic, wildlife, and recreational lands, officially designated by duly constituted public authorities. If rights-of-way must be routed through such historic places, parks, wildlife, or scenic areas, they should be located in areas or placed in a manner so as to be least visible from areas of public view and so far as possible in a manner designed to preserve the character of the area.

(iii) Rights-of-way should avoid heavily timbered areas and steep slopes, where practical.

(iv) Right-of-way clearings should be kept to the minimum necessary width to prevent interference of trees or other vegetation with the construction of proposed transmission facilities.

(v) The method of clearing rights-of-way should take into account matters of soil stability, protection of natural vegetation and the protection of adjacent resources.

(vi) Trees and other vegetation cleared from rights-of-way in areas of public view should be disposed of without undue delay. In all phases of construction, including burning of debris, such measures shall be taken for the prevention and control of fire and other hazards as are required by applicable law and regulations. Tree stumps which are adjacent to roads and other areas of public view should be cut close to the ground or removed.

(vii) Trees and shrubs which are not cleared should not be unnecessarily damaged during construction.

(viii) Efforts should be made to avoid clearance of rights-of-way to the mineral soil, except in the ditch itself. Where this does occur in scattered areas of the rights-of-way, the surface should be restored and stabilized without undue delay.

(ix) Soil which has been excavated during construction and not used should be evenly filled back onto the cleared area or removed from the site. The soil should be graded to comport with terrain of the adjacent land and vegetation planted and fertilized, where appropriate.

(x) Terraces and other erosion control devices should be constructed where necessary to prevent soil erosion on slopes on which rights-of-way are located.

(xi) Where rights-of-way cross streams and other bodies of water, the banks should be stabilized to prevent erosion. Construction on rights-of-way should be conducted in such manner as to keep to a minimum damage to shorelines, recreational areas and fish and wildlife habitats.

(xii) Replacement of earth adjacent to water crossings should be at slopes equal to or less than the normal angle of response for the soil type involved and sandbagging, seeding, or other methods of soil stabilization should be accomplished without undue delay.

(xiii) Blasting should not be done within or near stream channels without prior consultation with Federal and State conservation authorities having jurisdiction to determine what protective measures should be taken to minimize damage to fish and other aquatic life.

(xiv) Any potholes, marshes or similar water areas drained to facilitate construction should be reestablished to their preconstruction water levels and flow characteristics following completion of construction, if such reestablishment is consistent with landowner wishes.

(xv) Cofferdam or other diversionary techniques to lay pipe across streams should be used where necessary and practical to permit flow in one part of the stream while construction work is being performed in another part.

(xvi) Care should be taken to avoid oil spills and other types of pollution while work is performed in streams and other bodies of water and in their immediate drainage areas.

(xvii) Water used for pipeline testing taken from streams or other bodies of water should be taken in such manner as to minimize harm to the ecology, fish and wildlife resources, or aesthetic values of the areas. When testing water is released, it should be done in such a manner as not to cause erosion and siltation or damage to the ecology of the area.

(xviii) Excess construction materials and other debris should be removed from the right-of-way or otherwise suitably disposed of.

(xix) In wooded areas long views of cleared rights-of-way, visible from highways and other areas of public view, should be avoided. The rights-of-way alignment of these locations should be deflected before entering and leaving highways and areas of public view where such deflection is consistent with safe and sound engineering practice and accomplishes the desired results.

(xx) Where practical, rights-of-way should not cross hills and other high points at the crests, particularly where such crossing is in forested areas and clearly visible from highways and other areas of public view. When they must do so the alignment should be deflected near the crests where such deflection is consistent with safe and sound engineering practice and accomplishes the desired result of eliminating the notch in the tree line at the crests.

(xxi) Where rights-of-way enter dense timber from a meadow or other clearing and where such entrance is visible from highways and other areas of public view, screen planting should be employed.

(xxii) Temporary roads used for construction should be designed for proper drainage and built in such manner as to minimize soil erosion. Upon abandonment, such roads should be stabilized without undue delay.

(2) *Right-of-way maintenance.* (i) Once a cover of vegetation has been established on a right-of-way, it should be properly maintained.

(ii) Access roads and service roads should be maintained with proper cover, water bars and the proper slope in order to minimize soil erosion. They should be jointly used with other utilities and land management agencies where practical.

(iii) When chemicals are used for weed control, they should be applied at such time and in such manner as to minimize the impact of temporary discoloration of the foliage. Care should be taken to assure that chemicals used to control the growth of tree stumps do not damage the vegetation or add to water or soil pollution.

(iv) During inspection of rights-of-way attention should be given to locate gullies and fallen timber and to observe the condition of the vegetation. The use of aircraft to inspect and maintain rights-of-way should be encouraged.

(3) *Construction of aboveground appurtenant facilities.* (i) The proposed exterior plans and location of compressor stations and other aboveground facilities, including meter and regulator stations and communication towers, should be made appropriately available to local agencies which have jurisdiction.

(ii) Unobstructive sites should be selected where practical for the location of aboveground facilities.

(iii) Potential noise should be considered when the location for compressor stations is being determined. Such facilities should be located in areas where sound resonance would be minimal; consideration should be given to the use of accoustical treatment as a further means of noise abatement.

(iv) The size of aboveground facilities should be kept to the minimum feasible.

(v) The exterior or compressor stations and other aboveground facilities, to the extent consistent with the functional needs and economic feasibility of construction of such facilities, should not unduly detract from the surroundings and other buildings in the area.

(vi) In areas adjacent to such above ground facilities, trees and shrubs should be planted, or other appropriate landscaping installed, in order to enhance the appearance of such facilities, consistent with operating needs.

(vii) Storage tanks should be placed below ground where technology and economics make it feasible.

(viii) Yards and surrounding areas should be kept clean and free of unused or discarded materials.

(ix) The design and operation of aboveground facilities should conform to applicable air and water quality standards.

[Order 407, 35 FR 11389, July 16, 1970]

Subpart A—Applications for Certificates of Public Convenience and Necessity and for Orders Permitting and Approving Abandonment Under Section 7 of the Natural Gas Act, as Amended, Concerning Any Operation, Sales, Service, Construction, Extension, Acquisition or Abandonment

§ 157.5 Purpose and intent of rules.

(a) Applications under section 7 of the Natural Gas Act shall set forth all information necessary to advise the Commission fully concerning the operation, sales, service, construction, extension, or acquisition for which a certificate is requested or the abandonment for which permission and approval is requested. Some applications may be of such character that an abbreviated application may be justified under the provisions of § 157.7. Applications for permission and approval to abandon pursuant to section 7(b) of the Act shall conform to § 157.18 and to such other requirements of this part as may be pertinent. However, every applicant shall file all pertinent data and information necessary for a full and complete understanding of the proposed project, including its effect upon applicant's present and future operations and whether, and at what docket, applicant has previously applied for authorization to serve any portion of the market contemplated by the proposed project and the nature and disposition of such other project.

(b) Every requirement of this part shall be considered as a forthright obligation of the applicant which can only be avoided by a definite and positive showing that the information or data called for by the applicable rules is not necessary for the consideration and ultimate determination of the application.

(c) This part will be strictly applied to all applications as submitted and the burden of adequate presentation in intelligible form as well as justification for omitted data or information rests with the applicant.

§ 157.6 Applications; number of copies; general requirements.

(a) *Applicable rules.* An original and 7 conformed copies of an application under this part shall be furnished to the Commission. The Commission reserves the right to request additional copies. In all other respects applications shall conform to the requirements of §§ 157.5 through 157.14. Amendments to or withdrawals of applications shall conform to the requirements of §§ 385.213 and 385.214 of this chapter. If the application involves an acquisition of facilities, it shall conform to the additional requirements prescribed by §§ 157.15 and 157.16.

(b) *General content of application; filing fee.* Each application filed other than an application for permission and approval to abandon pursuant to section 7(b) shall be accompanied by the fee prescribed in Part 381 of this chapter or a petition for waiver pursuant to § 381.106 of this chapter and shall set forth the following information:

(1) The exact legal name of applicant; its principal place of business; whether an individual, partnership, corporation, or otherwise; State under the laws of which organized or authorized; and the name, title, and mailing address of the person or persons to whom communications concerning the application are to be addressed.

(2) The facts relied upon by applicant to show that the proposed service, sale, operation, construction, extension, or acquisition is or will be required by the present or future public convenience and necessity.

(3) A concise description of applicant's existing operations.

(4) A concise description of the proposed service, sale, operation, construction, extension, or acquisition, including the proposed dates for the beginning and completion of construction, the commencement of operations and of acquisition, where involved.

(5) A full statement as to whether any other application to supplement or effectuate applicant's proposals must be or is to

be filed by applicant, any of applicant's customers, or any other person, with any other Federal, State, or other regulatory body; and if so, the nature and status of each such application.

(6) A table of contents which shall list all exhibits and documents filed in compliance with §§ 157.5 through 157.18, as well as all other documents and exhibits otherwise filed, identifying them by their appropriate titles and alphabetical letter designations. The alphabetical letter designations specified in §§ 157.14, 157.16, and 157.18 must be strictly adhered to and extra exhibits submitted at the volition of applicant shall be designated in sequence under the letter Z (Z1, Z2, Z3, etc.).

(7) A form of notice suitable for publication in the **FEDERAL REGISTER**, as contemplated by § 157.9, which will briefly summarize the facts contained in the application in such way as to acquaint the public with its scope and purpose.

(c) *Requests for shortened procedure.* If shortened procedure is desired a request therefor shall be made in conformity with § 385.802 of this chapter and may be included in the application or filed separately.

[17 FR 7386, Aug. 14, 1952, as amended by Order 196, 22 FR 2882, Apr. 24, 1957; Order 217, 24 FR 9474, Nov. 25, 1959; Order 280, 29 FR 4876, Apr. 7, 1964; Order 317, 31 FR 432 Jan. 13, 1966; Order 225, 47 FR 19057, May 3, 1982; Order 433, 50 FR 40345, Oct. 3, 1985]

§ 157.7 Abbreviated applications.

(a) *General.* When the operations sales, service, construction, extensions, acquisitions or abandonment proposed by an application do not require all the data and information specified by this part to disclose fully the nature and extent of the proposed undertaking, an abbreviated application may be filed provided it contains all information and supporting data necessary to explain fully the proposed project, its economic justification, its effect upon applicant's present and future operations and upon the public proposed to be served, and is otherwise in conformity with the applicable requirements of this part regarding form, manner of presentation, and filing. Such an application shall (1) state that it is an abbreviated application; (2) specify which of the data

and information required by this part are omitted; and (3) relate the facts relied upon to justify separately each such omission.

(b) *Gas supply facilities – budget-type certificates.* Interstate pipeline companies holding budget-type certificates may construct and operate minor, routine gas supply facilities thereunder, subject to the following conditions:

(1)(i) The total cost of the gas supply facilities constructed during any calendar year under the certificate shall not exceed 3 percent of the applicant's gas plant (Account 101, Uniform System of Accounts Prescribed for Natural Gas Companies) or \$20 million, whichever is less; except that a company with less than \$16 ⅔ million in its gas plant account may construct facilities having a total cost of up to \$500,000.

(ii) The total cost of any single onshore project constructed under the budget-type certificate shall not exceed the lesser of 25 percent of the certificate-holder's total calendar year dollar limit or \$2.5 million.

(iii) The cost of any single offshore project constructed under the budget-type certificate shall not exceed the lesser of \$3.5 million or the certificate-holder's calendar year dollar limit.

(iv) Notwithstanding paragraph (b)(2)(ii), the single project limit for onshore projects constructed by a certificate-holder having a total calendar year dollar limit of \$2 million or less shall be \$500,000.

(2) Any company proposing the construction of facilities having a total cost in excess of the amounts specified in § 157.7(b)(1) shall file an application requesting a waiver of its provisions. Such an application will be granted only for good cause shown.

(3)(i) The certificate-holder shall file with the Commission by March 1 of the year following each calendar year during which it has a budget-type certificate in effect a statement, in writing and under oath, for each individual project constructed under the budget-type certificate which contains the following information:

(A) A description of the gas supply facilities installed, including a description of the length and size of pipelines, compressor

horsepower, metering facilities, taps, valves, and any other facilities constructed;

(B) The specific location of the gas supply facilities installed;

(C) The actual installed cost of each facility listed pursuant to paragraph (b)(3)(i)(A), separately stating the cost of materials and labor as well as other costs allocable to the facilities;

(D) The estimated gas supply in Mcf at 14.73 psia made available to the applicant by means of the described facilities;

(E) The names of the fields connected;

(F) The specific location of the supply source or well attached if the attachment is for gas owned or produced by the applicant;

(G) The names of the independent producers, other sellers or intrastate pipeline from whom the gas is being purchased or received, together with the respective dates of their gas sales or transportation contracts and any FERC gas rate schedule designations if the facility is to receive gas purchased by the applicant;

(H) A statement clearly reflecting whether the report is for a full calendar year or a partial year if the report is for the certificate-holder's first budget-type certificate year.

(I) The amount of the certificate-holder's gas plant account (Account 101), as well as its computation of its calendar year and single project dollar limits.

(J) The purpose for constructing the facilities, specifically stating if the facilities were constructed for a transaction authorized under section 311 or 312 of the Natural Gas Policy Act and Part 284 of this chapter;

(K) If no construction took place under the certificate, a statement to that effect;

(L) Whether or not it wishes to terminate its budget certificate authority for years thereafter.

(ii) Within 10 days of the commencement of use of any facility necessary to connect gas assigned, sold, or transported pursuant to section 284 self-implementation authority which has costs associated with it of more than the greater of \$50,000 or 1 cent per MMBtu, a budget-type certificate holder shall file with the Commission notice of such construction. This notice should include the cost of the facilities, the duration of the transaction, and the number of MMBtu of gas being purchased, assigned, or transported during the duration of the transaction. The completion report required by § 157.7(b)(3)(i) shall include the details of that project.

(iii) Completion reports due for partial calendar years shall be filed by March 1st of the following calendar year. The total calendar year dollar limit for construction during such a partial calendar year shall bear the same proportion to the certificate-holder's § 157.7(b)(1)(i) limit as the number of months in the partial calendar year bears to 12.

(4)(i) For purposes of this paragraph, "gas supply facilities" means minor, routine facilities, subject to the Natural Gas Act jurisdiction of this Commission, which are necessary to connect the system of an interstate pipeline company, or the system of another pipeline company authorized to transport gas for or exchange gas with an interstate pipeline company, to natural gas supplies destined for the system supply of an interstate pipeline company.

(ii) Gas supply facilities do not include facilities constructed to effect the purchase of gas from an interstate pipeline's system supply, from plants manufacturing synthetic gas or from plant's gasifying LNG.

(5)(i) A budget-type certificate authorizing the construction of minor, routine gas supply facilities subject to the limits, conditions, and reporting requirements of this chapter will be granted when an abbreviated application is filed.

(ii) Thereafter, the certificate-holder may continue to construct facilities under that budget-type certificate as long as it complies with the definitions, limits, conditions, and reporting requirements set forth in these regulations.

(iii) A budget-type certificate may be revoked by this Commission at any time.

(6) Gas supply facilities must be constructed and reported under the budget-type certificate of the person which will actually construct and operate those facilities.

(7)(i) A completion report due on budget-type certificates issued before December 1, 1979 shall be filed within 60 days of the expiration of the period for which it was granted.

(ii) Applications for certificates under these transitional rules by persons holding budget-type certificates on the effective date of this order shall be made at least 60 days before the lapse of the existing certificate.

(iii) Facilities constructed to connect a certificate-holder's own production may be constructed under existing certificates only if construction is commenced after December 1, 1979.

(iv) Facilities constructed to facilitate transactions authorized under sections 311 and 312 of the Natural Gas Policy Act may be constructed under existing certificates only if construction is commenced after May 18, 1979.

(v) The date of commencement of construction of any facilities constructed under § 157.7(b)(7) (iii) and (iv) under certificates existing on or before the effective date of this rule shall be included in the completion report for that certificate by § 157.7(b)(7)(i).

(c) *Miscellaneous rearrangements of facilities – budget-type application.* An abbreviated application requesting a budget-type certificate authorizing the construction during a given twelve-month period, and operation of gas-sales or transportation facilities may be filed when:

(1) The facilities proposed in the application are to be used for miscellaneous rearrangements not resulting in any change of service rendered by means of the facilities involved, e.g., changes in existing field operation or relocation of existing sales or transportation facilities when required by highway construction, dam construction or other similar reasons.

(2)(i) The total estimated cost of the rearrangement of facilities proposed in the application does not exceed \$300,000 except where the applicant's gas plant (Account No. 101, Uniform System of Accounts Prescribed for Natural Gas Companies) is \$10,000,000 or less, in which case the total estimated cost of the gas-sales facilities proposed in the application shall not exceed \$100,000.

(ii) Any application proposing the construction of facilities having an estimated cost in excess of the amounts specified in paragraph (c)(2)(i) of this section shall be accompanied by a request for waiver of the provisions of such subdivision and will be granted only for good cause shown.

(3) The application contains a statement indicating the maximum facilities to be installed during the authorized construction period, including the maximum number of lateral or loop lines to be installed and their maximum length and diameter, the maximum number of taps and meters to be installed, and the estimated cost of facilities for each such type or project.

(4) The applicant agrees to file with the Commission, within sixty days after expiration of the authorized construction period, a statement showing for each individual project:

(i) Description of the rearranged facilities installed, e.g., location, miles and size of pipeline (including wall thickness and minimum yield point), taps, laterals, lateral loop lines, metering and regulating facilities.

(ii) Actual cost of facilities subdivided by size of pipeline, taps, laterals, lateral loop lines, metering and regulating facilities, and appurtenant facilities.

(d) *Underground gas storage facilities – budget-type application.* An abbreviated application requesting a budget-type certificate authorizing the construction and operation of natural gas pipeline and compression facilities for the testing and development of underground reservoirs for the possible storage of gas for a three-year period may be filed when:

(1) The volume of natural gas to be injected into the prospective storage fields does not exceed a total of 10,000,000 Mcf, with no more than 2,000,000 Mfc being injected into any single field.

(2) Gas will be injected for testing purposes only during off-peak periods.

(3) No storage field developed pursuant to this section will be utilized to render service without further authorization by the Commission; except that gas may be withdrawn on occasion for testing purposes.

(4)(i) The total expenditures for the three-year period does not exceed \$3,000,000 or \$1,000,000 for any one-year period. These costs shall include expenditures for leases, wells, pipeline, compressor and related facilities, but shall not include the cost of the gas to be used for testing purposes.

(ii) Any application proposing the construction of facilities having an estimated cost in excess of the amounts specified in paragraph (d)(4)(i) of this section shall be accompanied by a request for waiver of the provisions of such paragraph and will be granted only for good cause shown.

(5) The cost of any project ultimately determined to be infeasible for storage shall be charged to Account No. 822 of Part 201, Underground Storage Exploration and Development Expenses.

(6) Applicant agrees to submit within 60 days after the end of each year of the three-year budget period a statement, under oath, showing for each project:

(i) A description of the facilities constructed and the type of storage reservoir; i.e., gas expansion or dry gas, water-drive or aquifer.

(ii) The location of the facilities.

(iii) The cost of such facilities.

(iv) The monthly volumes of gas injected into and withdrawn from each reservoir.

(v) An estimate of the storage capacity and daily deliverability of each project.

(7) If the reservoir to be tested and developed is an aquifer-type reservoir, applicant agrees to submit for each such project quarterly reports, under oath, containing the following information in addition to the data required by paragraph (d)(6) of this section:

(i) The daily volumes of natural gas injected into and withdrawn from the aquifer during the quarter and the volume of gas in the aquifer at the end of each month.

(ii) The maximum daily injection or withdrawal rate experienced during the quarter and the average working pressure on such maximum days taken at a central measuring point where the total volume injected or withdrawn is measured.

(iii) Results of any tracer program by which leakage of gas may be determined.

(iv) Any pressure surveys of gas wells and water levels in observation wells conducted during the quarter by individual well. Copies of any core analyses, gamma ray, neutron or other electric log surveys and back-pressure tests taken during the quarter.

(v) A map of the storage project showing the location of the wells, the latest revised structure contours, the location and extent of the gas bubble. This map need not be filed if there is no material change from the map previously filed.

(vi) Such other data or reports which may aid the Commission in the evaluation of the project.

(vii) Reports shall continue to be filed quarterly through the three-year period and thereafter until the project is either certificated for regular service or abandoned, unless otherwise ordered by the Commission.

(e) *Direct sales measuring station and related minor facilities-budget-type abandonment application.* An abbreviated application requesting a budget-type authorization permitting the cessation of service and removal of direct sales measuring, regulating, and related minor facilities during a given 12-month period may be filed when:

(1) The deliveries to any one direct sale customer through any one of the sales measuring facilities to be abandoned have not exceeded 100,000 Mcf annually during the last year of service.

(2) The applicant will not abandon any service unless it has received a written request, or written permission, from the direct sale customer to terminate service. In the event such request or permission cannot be obtained, a statement certifying that the customer has no further need for the service must be filed.

(3) The applicant agrees to file with the Commission, within 60 days after expiration of the authorized abandonment period:

(i) A statement showing for each individual project a description of the facilities abandoned and the docket numbers of the prior proceedings in which the facilities or services abandoned were certificated.

(ii) A statement indicating in each case the reason why the service or facilities were abandoned, together with a copy of the written request or permission, or statement in lieu thereof, for termination of service. In the event a written request or permission cannot be obtained from the customer, applicant shall set forth in his statement a detailed explanation of how the abandonment is in the public interest.

(iii) A statement showing the effect of the abandonment upon any rate schedules or tariffs on file with this Commission.

(iv) A concise description of the changes of property, indicating the cost of property abandoned in place, the cost of property removed and salvaged together with the relevant information required by paragraph (f) of § 157.18.

(v) A geographic map or maps of suitable scale and detail showing the location of the facilities abandoned.

(f) *Applications to include exhibit F-IV.* All applications filed in accordance with paragraphs (b), (c), (d), and (g) of this section shall include and exhibit F-IV as prescribed in § 157.14(a)(6-d).

(g) *Field gas compression facilities – budget-type application.* An abbreviated application requesting budget-type authorization to permit (1) abandonment of field compression and related metering and appurtenant facilities, (2) construction of new or additional field compression and related metering and appurtenant facilities, and (3) removal and relocation of existing field compression and related metering and appurtenant facilities during a given twelve-month period and operation of said facilities may be filed when:

(i) The proposed construction, relocation, removal, and abandonment will not result in changing applicant's system salable capacity or service from that authorized prior to the date of filing the budget application, but will permit the applicant more effectively to utilize the facilities to take gas into its system from existing sources of supply for use in meeting the requirements of its customers. Existing sources of supply are those gas producing fields, reservoirs, wells, or formations from which applicant was receiving gas at the date of filing the budget application, except those producing fields, reservoirs, wells, or formations used exclusively for making emergency sales under § 2.68 and 2.70 of this chapter or §§ 157.22 and 157.29.

(ii) The facilities involved in the budget application are those used or to be used to transport natural gas into applicant's

interstate system, pursuant to Commission authorization, from existing sources of natural gas supply, as defined above, including its own producing fields, or purchase from other producers or sellers or receipts of gas under exchange arrangements in producing fields, onshore or offshore.

(iii) The total cost of constructing the new or additional field compression and related metering and appurtenant facilities and the total out-of-pocket cost of abandoning, removing and relocating existing compression and related metering and appurtenance facilities shall not exceed in aggregate 2 percent of the applicant's gas plant account (Account 101, Uniform System of Accounts Prescribed for Natural Gas Companies) or \$3 million, whichever is less, except that an applicant with less than \$10 million in such gas plant account may spend a total of \$500,000 under this authorization. Out-of-pocket costs excludes the original cost of facilities abandoned, removed, or relocated. The cost for any single project to be installed during the authorized period shall not exceed 25 percent of the total budget amount or \$500,000, whichever is less.

(iv) The applicant agrees to file with the Commission within 60 days after the expiration of the authorized budget period:

(a) A statement showing for each individual project a description of the facilities constructed, removed, relocated and abandoned including the docket numbers of the prior proceedings in which the facilities were certificated permitting attachment of the source of supply to the system or augmenting applicant's ability to take gas from such source of supply.

(b) A statement indicating in each case the reason for the construction, relocation, removal or abandonment of the facilities.

(c) A concise description for each individual project of the changes in property made under the budget authority indicating the costs of any new or additional construction and all out-of-pocket costs involved in relocating property, abandoning property, removing property and salvaging property, together with the relevant information required by paragraph (f) of § 157.18.

(d) A geographical map or maps of suitable scale and detail showing the location of the abandoned facilities, the location from which facilities were removed, the new location of the relocated facilities and the location of any new or additional facilities constructed pursuant to this budget authority.

(e) A statement showing for each individual project, where facilities were abandoned, the names of the independent producers or other sellers from whom the natural gas was purchased or exchanged, together with the respective dates or their gas sales contracts, FPC gas rate schedule designations and related certificate docket numbers.

Existing facilities of the nature cited above may be reclaimed and put into stock or may be taken from stock and put into field operation, as deemed necessary.

(h) *Filing fees.* Each application filed in accordance with paragraphs (b), (c), (d), (e), and (g) of this section other than an application for permission and approval to abandon pursuant to section 7(b) must be accompanied by the fee prescribed in Part 381 of this chapter or a petition for waiver pursuant to § 381.106 of this chapter.

[Order 280, 29 FR 4876, Apr. 7, 1964]

EDITORIAL NOTE: FOR FEDERAL REGISTER citations affecting § 157.7, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 157.8 Acceptance for filing or rejection of applications.

Applications will be docketed when received and the applicant so advised. If an application does not conform to the requirements of this part the Director of the Office of Pipeline and Producer Regulation will notify the applicant of all deficiencies. Deficient applications not amended within 20 days of the notice of deficiency, or such longer period as may be specified in the notice of deficiency, will be rejected by the Director of the Office of Pipeline and Producer Regulation as provided by

§ 385.2001(b) of this chapter. Copies of a rejected application will be returned. An application which relates to an operation, sale, service, construction, extension, acquisition, or abandonment, concerning which a prior application has been filed and rejected, shall be docketed as a new application. Such new application shall state the docket number of the prior rejected application.

[Order 280, 29 FR 4876, Apr. 7, 1964, as amended at 43 FR 36437, Aug. 17, 1978; Order 225, 47 FR 19057, May 3, 1982]

§ 157.9 Notice of application.

Notice of each application filed, except when rejected in accordance with § 157.8, will be published in the **FEDERAL REGISTER** and copies of such notice mailed to States affected thereby. Persons desiring to receive a copy of the notice of every application shall so advise the Secretary.

[17 FR 7386, Aug. 14, 1952]

§ 157.10 Interventions and protests.

Notices of applications, as provided by § 157.9, will fix the time within which any person desiring to participate in the proceeding may file a petition to intervene, and within which any interested regulatory agency, as provided by § 385.214 of this chapter, desiring to intervene may file its notice of intervention. Any person filing a petition to intervene or notice of intervention shall state specifically whether he seeks formal hearing on the application. Failure to make timely filing will constitute ground for denial of participation in the absence of extraordinary circumstances for good cause shown. A copy of each application, supplement and amendment thereto, including exhibits required by §§ 157.14, 157.16 and 157.18 which are specifically requested, shall upon request be promptly supplied by the applicant to anyone who has filed a petition for leave to intervene or given notice of intervention. Protests may be filed in accordance with § 385.211 of this chapter within the time permitted by any person who does not seek to participate in the proceeding.

[Order 280, 29 FR 4877, Apr. 7, 1964, as amended by Order 225, 47 FR 19057, May 3, 1982; 48 FR 786, Jan. 7, 1983]

§ 157.11 Hearings.

(a) *General.* The Commission will schedule each application for public hearing at the earliest date possible giving due consideration to statutory requirements and other matters pending, with notice thereof as provided by § 1.19(b) of this chapter: *Provided, however,* That when an application is filed less than fifteen days prior to the commencement of a hearing theretofore ordered on a pending application and seeks authority to serve some or all of the markets sought in such pending application or is otherwise competitive with such pending application, the Commission will not schedule the new application for hearing until it has rendered its final decision on such pending application, except when, on its own motion, or on appropriate application, it finds that the public interest requires otherwise.

(b) *Shortened procedure.* If no protest or petition to intervene raises an issue of substance, the Commission may upon request of the applicant dispose of an application in accordance with the provisions of § 385.802 of this chapter.

[17 FR 7386, Aug. 14, 1952, as amended by Order 225, 47 FR 19057, May 3, 1982]

§ 157.12 Dismissal of application.

Except for good cause shown, failure of an applicant to go forward on the date set for hearing and present its full case in support of its application will constitute ground for the summary dismissal of the application and the termination of the proceedings.

[17 FR 7386, Aug. 14, 1952]

§ 157.13 Form of exhibits to be attached to applications.

Each exhibit attached to an application must conform to the following requirements:

(a) *General requirements.* Each exhibit shall contain a title page showing applicant's name, docket number (to be left blank), title of the exhibit, the proper letter designation of the exhibit, and, if of 10 or more pages, a table of contents, citing by page, section number or subdivision, the component elements or matters therein contained.

(b) *Reference to annual reports and previous applications.* An application may refer to annual reports and previous applications filed with the Commission and shall specify the exact pages or exhibit numbers of the filing to which reference is made, including the page numbers in any exhibit to which reference is made. When reference is made to a previous application the docket number shall be stated. No part of a rejected application may be incorporated by reference.

(c) *Interdependent applications.* When an application considered alone is incomplete and depends vitally upon information in another application, it will not be accepted for filing until the supporting application has been filed. When applications are interdependent, they shall be filed concurrently.

(d) *Measurement base.* All gas volumes, including gas purchased from producers, shall be stated upon a uniform basis of measurement, and, in addition, if the uniform basis of measurement used in any application is other than 14.73 p.s.i.a., then any volume or volumes delivered to or received from any interstate natural-gas pipeline company shall also be stated upon a basis of 14.73 p.s.i.a.; similarly, total volumes on all summary sheets, as well as grand totals of volumes in any exhibit, shall also be stated upon a basis of 14.73 p.s.i.a. if the uniform basis of measurement used is other than 14.73 p.s.i.a.

[17 FR 7387, Aug. 14, 1952, as amended by Order 185, 21 FR 1486, Mar. 8, 1956; Order 280, 29 FR 4877, Apr. 7, 1964]

§ 157.14 Exhibits.

(a) *To be attached to each application.* All exhibits specified shall accompany each application when tendered for filing.

Together with each exhibit applicant shall set forth a full and complete explanation of the data submitted, the manner in which it was obtained, and the reasons for the conclusions which are derived therefrom. If the Commission determines that a formal hearing upon the application is required or that testimony and hearing exhibits should be filed, the Secretary shall promptly notify the applicant that submittal of all the exhibits and testimony of all witnesses to be sponsored by the applicant in support of his case-in-chief is required. Submittal of such exhibits and testimony shall be within 20 days from the date of the Secretary's notice, or such longer time as he shall specify. Section 157.6(a) shall govern the number of copies to be furnished to the Commission. Interveners and persons becoming interveners after the date of the Secretary's notice shall be advised by the applicant of the afore-specified exhibits and testimony, and shall be furnished with copies upon request.

(1) *Exhibit A — Articles of incorporation and bylaws.* If applicant is not an individual, a conformed copy of its articles of incorporation and bylaws, or other similar documents.

(2) *Exhibit B — State authorization.* For each State where applicant is authorized to do business, a statement showing the date of authorization, the scope of the business applicant is authorized to carry on and all limitations, if any, including expiration dates and renewal obligations. A conformed copy of applicant's authorization to do business in each State affected shall be supplied upon request.

(3) *Exhibit C — Company officials.* A list of the names and business addresses of applicant's officers and directors, or similar officials if applicant is not a corporation.

(4) *Exhibit D — Subsidiaries and affiliation.* If applicant or any of its officers or directors, directly or indirectly, owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of any other person or organized group of persons engaged in production, transportation, distribution, or sale of natural gas, or of any person or organized group of persons engaged in the construction or financing of such

enterprises or operations, a detailed explanation of each such relationship, including the percentage of voting strength represented by such ownership of securities. If any person or organized group of persons, directly or indirectly, owns, controls, or holds with power to vote, 10 percent or more of the outstanding voting securities of applicant — a detailed explanation of each such relationship.

(5) *Exhibit E — Other pending applications and filings.* A list of other applications and filings under sections 1, 3, 4 and 7 of the Natural Gas Act filed by the applicant which are pending before the Commission at the time of the filing of an application and which directly and significantly affect the application filed, including an explanation of any material effect the grant or denial of those other applications and filings will have on the application and of any material effect the grant or denial of the application will have on those other applications and filings.

(6) *Exhibit F — Location of facilities.* Unless shown on Exhibit G or elsewhere, a geographical map of suitable scale and detail showing, and appropriately differentiating between all of the facilities proposed to be constructed, acquired or abandoned and existing facilities of applicant, the operation or capacity of which will be directly affected by the proposed facilities or the facilities proposed to be abandoned. This map, or an additional map, shall clearly show the relationship of the new facilities to the applicant's overall system and shall include:

(i) Location, length, and size of pipelines.

(ii) Location and size (rated horsepower) of compressor stations.

(iii) Location and designation of each point of connection of existing and proposed facilities with (a) mainline industrial customers, gas pipeline or distribution systems, showing towns and communities served and to be served at wholesale and retail, and (b) gas-producing and storage fields, or other sources of gas supply.

(6-a) *Exhibit F-I-Factors considered in use of joint rights-of-way.* (i) Unless shown on Exhibit F, Exhibit G, or elsewhere, applicant shall submit, for areas where construction will not be on applicant's currently used rights-of-way or immediately adjacent thereto, a map or diagram of all facilities proposed to be constructed showing existing rights-of-way belonging either to applicant or to others such as pipelines, electric powerlines, highways, and railroads which could practically be used.

(ii) In addition to such map or diagram applicant shall submit a brief statement explaining which of such rights-of-way it intends to use or consider using.

(iii) The statement may indicate that, while applicant intends to use the proposed right-of-way at the date of filing of the application or amendment or supplement thereto, it is understood that the actual construction of the proposed facility may require routing deviations because of unanticipated obstacles or difficulties.

(iv) Applicant will not be required to submit revisions to Exhibit F-1 unless requested by the Commission or unless the routing of the pipeline is substantially revised by applicant prior to beginning of construction.

(6-b) *Exhibit F-II – Factors considered in locating facilities in scenic, historic, recreational or wildlife areas.* Where a proposed facility will or may be located in or routed through any of the national historical places listed in the National Register of Historic Places maintained by the Secretary of the Interior, natural landmarks listed in the National Register of Natural Landmarks maintained by the Secretary of the Interior or through any park, scenic, wildlife, or recreational areas, officially designated by duly constituted public authorities, and where such facility may have a significant effect on the scenic, historic, wildlife or recreational values of such areas, applicant shall state the reason for such location and shall list Federal, State and local agencies having jurisdiction which have been or will be consulted prior to construction.

(6-c) *Exhibit F-III – Statement on adoption of guidelines concerning right-of-way and construction activities.* A statement that the guidelines set forth in § 2.69 of this chapter have been adopted by the applicant, that the relevant portions thereof have been or will be issued to construction personnel of applicant, and as to what appropriate instructions will be issued to contractors and others involved in implementation of the guidelines.

(6-d) *Exhibit F-IV. Exhibit F-IV—Statement by the Applicant Concerning the Requirements of the National Environmental Policy Act of 1969, Pub. L. 91-190, 83 Stat 852, title I, section 102.* All applications governed by § 157.7 (b), (c), (d), and (g) shall include a brief statement concerning the following factors:

- (i) The environmental impact of the proposed actions,
- (ii) Any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) Alternatives to the proposed action,
- (iv) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

(7) *Exhibit G – Flow diagrams showing daily design capacity and reflecting operation with and without proposed facilities added.* A flow diagram showing daily design capacity and reflecting operating conditions with only existing facilities in operation. A second flow diagram showing daily design capacity and reflecting operating conditions with both proposed and existing facilities in operation. Both flow diagrams shall include the following for the portion of the system affected:

- (i) Diameter, wall thickness, and length of pipe installed and proposed to be installed and the diameter and wall thickness of the installed pipe to which connection is proposed.

(ii) For each proposed new compressor station and existing station, the size, type and number of compressor units, horsepower required, horsepower installed and proposed to be installed, volume of gas to be used as fuel, suction and discharge pressures, and compression ratio.

(iii) Pressures and volumes of gas at the main line inlet and outlet connections at each compressor station.

(iv) Pressures and volumes of gas at each intake and take-off point and at the beginning and terminus of the existing and proposed facilities and at the intake or take-off point of the existing facilities to which the proposed facilities are to be connected.

(8) *Exhibit G-I – Flow diagrams reflecting maximum capabilities.* If Exhibit G does not reflect the maximum deliveries which applicant's existing and proposed facilities would be capable of achieving under most favorable operating conditions with utilization of all facilities, include an additional diagram or diagrams to depict such maximum capabilities. If the horsepower, pipelines, or other facilities on the segment of applicant's system under consideration are not being fully utilized due, e.g., to capacity limitation of connecting facilities or because of the need for standby or spare equipment, the reason for such nonutilization shall be stated.

(9) *Exhibit G-II – Flow diagram data.* Exhibits G and G-I shall be accompanied by a statement of engineering design data in explanation and support of the diagrams and the proposed project, setting forth:

(i) Assumptions, bases, formulae, and methods used in the development and preparation of such diagrams and accompanying data.

(ii) A description of the pipe and fittings to be installed, specifying the diameter, wall thickness, yield point, ultimate tensile strength, method of fabrication, and methods of testing proposed.

(iii) When lines are looped, the length and size of the pipe in each loop.

(iv) Type, capacity, and location of each natural gas storage field or facility, and of each dehydration, desulphurization, natural gas liquefaction, hydrocarbon extraction, or other similar plant or facility directly attached to the applicant's system, indicating which of such plants are owned or operated by applicant, and which by others, giving their names and addresses.

(v) If the daily design capacity shown in *Exhibit G* is predicated upon an ability to meet each customer's maximum contract quantity on the same day, explain the reason for such coincidental peak-day design. If the design day capacity shown in *Exhibit G* is predicated upon an assumed diversity factor, state that factor and explain its derivation.

(vi) The maximum allowable operating pressure of each proposed facility for which a certificate is requested, as permitted by the Department of Transportation's safety standards. The applicant shall certify that it will design, install, inspect, test, construct, operate, replace, and maintain the facilities for which a certificate is requested in accordance with Federal safety standards and plans for maintenance and inspection or shall certify that it has been granted a waiver of the requirements of the safety standards by the Department of Transportation in accordance with the provisions of section 3(e) of the Natural Gas Pipeline Safety Act of 1968. Pertinent details concerning the waiver shall be set forth.

(10) *Exhibit H—Total gas supply data.* A statement of total gas supply committed to, controlled by, or possessed by applicant which is available to it for the acts and services proposed, together with:

(i) The estimated remaining recoverable salable gas reserves available to applicant submitted in the form and containing all the data and information required by FPC Form No. 15, Annual Report of Gas Supply. (See § 260.7 of this chapter.)

(ii) Deliverability studies showing the volumes of natural gas which can and are proposed to be obtained each year submitted in the form and containing the data and information as required by FPC Form No. 15, Annual Report of Gas Supply.

(iii) The names and addresses of persons with whom applicant has gas-purchase contracts and the estimated volumes of gas reserves applicant has available under each contract, segregated by gas fields and reservoirs thereof with names and locations of fields (State, county or parish).

(iv) The maps required by FPC Form No. 15, Annual Report of Gas Supply.

(v) A conformed copy of each gas-purchase contract upon which applicant proposes to rely. Only three of the total number of copies of Exhibit H filed need include a copy of such contract. Contracts already on file with the Commission may be incorporated by reference without supplying additional copies, provided such contracts are identified with particularity by stating the exact pages of the contracts to be incorporated by reference and the file or docket number designation to which reference is made. The Commission or the presiding officer may direct that additional copies of such contracts be furnished to the Commission or to other parties to the proceeding. Any contract executed on and after April 2, 1962, and filed in support of an applicant's gas supply showing will be given no consideration in determining adequacy of gas supply if it contains any price-changing provisions other than those defined as permissible in § 154.93 of this chapter.

(vi) Pipeline companies which have filed annual reports in conformity with § 260.7 of this chapter will be required to file additional information with regard to gas supply and deliverability in support of applications for certificates for authorization to increase existing sales, facilities or capacity; to construct new facilities to make new sales; to alter any type of gas service; and to attach new sources of supply except budget-type applications filed under paragraph (b) of § 157.7 of this chapter. In all other applications the pipeline company may rely on the information set forth in said annual report, by reference thereto, unless otherwise ordered by the Commission. When gas supply and deliverability information is required to be in the application and is not permitted to be incorporated by reference, such information need pertain only to supply and deliverability for that phase

of the company operations which would be affected by the facility or sale for which authorization is sought. In those instances, the pipeline company may file only those portions of the annual report for which changes have been made or which are supplemental to the annual report then currently on file with the Commission. For each new source of supply which is reported, the pipeline company shall file detailed gas supply and deliverability information, including a summary of the remaining recoverable salable gas reserves in each reservoir, all factors used for the reserve estimate in each reservoir, a 10-year deliverability projection for each supply source and any other information that the Commission may require. Total system supply and deliverability information shall be included in all applications for authorization to serve major new markets or to serve major existing markets from new sources of gas supply over new routes. The receipt, maintenance, and consideration of any information received by the Commissions staff for review under this section is subject to the requirements of § 388.197 and § 2.72 of this chapter and the laws of the United States.

(vii) A study of each proposed gas storage field showing: Location; geology; original and present reserves for each reservoir; original and present pressure of each reservoir; proposed top and base storage pressures; proposed top and base gas volumes to be stored; a deliverability study, including daily and annual injection and withdrawal rates and pressures; and maximum daily deliverability and maximum storage capacity under the proposed plan of development.

(11) *Exhibit I – Market data.* A system-wide estimate of the volumes of gas to be delivered during each of the first 3 full years of operation of the proposed service, sale, or facilities and during the years when the proposed facilities are under construction, and actual data of like import for each of the 3 years next preceding the filing of the application, together with:

(i) Names and locations of customer companies and municipalities, showing the number of residential, commercial, firm industrial, interruptible industrial, residential space-heating, commercial space-heating, and other types of customers for each distribution system to be served at retail or wholesale; and the

names and locations of each firm and interruptible direct industrial customer whose estimated consumption totals 10,000 Mcf or more in any calendar month or 100,000 Mcf or more per year together with an explanation of the end use to which each of these industrial customers will put the gas.

(ii) Applicant's total annual and peak day gas requirements by classification of service in paragraph (a)(11)(i) of this section, divided as follows: Gas requirements (a) for each distribution area where gas is sold by applicant at retail; (b) for each wholesale customer; (c) for all main line direct industrial customers; and (d) company use and unaccounted-for gas, for both the applicant and each wholesale customer.

(iii) Total past and expected curtailments of service by the applicant and each wholesale customer proposing to receive new or additional supplies of gas from the project, all to be listed by the classifications of service in paragraph (a)(11)(i) of this section.

(iv) Explanation and derivation of basic factors used in estimating future requirements, including, for example: Peak-day and annual degree-day deficiencies, annual load factors of applicant's system and of its deliveries to its proposed customers; individual consumer peak-day and annual consumption factors for each class of consumers, with supporting historical data; forecasted saturation of space-heating as related to past experience; and full detail as to all other sources of gas supply available to applicant and to each of its customers, including manufacturing facilities and liquid petroleum gas.

(v) Conformed copy of each contract, letter of intent or other agreement for sale or transportation of natural gas proposed by the application. Indicate the rate to be charged. If no agreements have been made, indicate the basis for assuming that contracts will be consummated and that service will be rendered under the terms contemplated in the application.

(vi) A full description of all facilities, other than those covered by the application, necessary to provide service in the communities to be served, the estimated cost of such facilities, by whom they are to be constructed, and evidence of economic feasibility.

(vii) A copy of each market survey made within the past three years for such markets as are to receive new or increased service from the project applied for.

(viii) A statement showing the franchise rights of applicant or other person to distribute gas in each community in which service is proposed.

(ix) When an application requires a statement of total peak-day or annual market requirements of affiliates, whose operations are integrated with those of applicant, to demonstrate applicant's ability to provide the service proposed or to establish a gas supply, estimates and data required by this subparagraph shall also be stated in like detail for such affiliates.

(x) When the proposed project is for service which would not decrease the life index of the total system gas supply by more than one year, the data required in paragraphs (a)(11)(i) to (ix), inclusive, of this section need be submitted only as to the particular market to receive new or additional service.

(12) *Exhibit J – Conversion to natural gas.* If it is assumed that proposed customers in new areas or firm and interruptible direct industrial customers whose estimated consumption totals 10,000 Mcf or more in any calendar month or 100,000 Mcf or more in any calendar year will convert from other fuels to natural gas, state the basis for such assumption and include a study showing estimated cost of converting customers' facilities to natural gas. The study should indicate the number of customers of each of the other fuels who applicant anticipates will convert to natural gas and the current cost of fuel to be displaced compared to the cost of natural gas on an equivalent Btu basis.

(13) *Exhibit K – Cost of facilities.* A detailed estimate of total capital cost of the proposed facilities for which application is made, showing cost of construction by operating units such as compressor stations, main pipelines, laterals, measuring and regulating stations, and separately stating the cost of right-of-way, damages, surveys, materials, labor, engineering, and inspection, administrative overhead, fees for legal and other services,

allowance for funds used during construction, and contingencies. Include a brief statement indicating the source of information used as the basis for the above estimate. If not otherwise set forth, submit data on preliminary bids, if any, for the proposed facilities and recent experienced cost data for facilities of similar character.

(14) *Exhibit L – Financing.* Plans for financing the proposed facilities for which the application is filed, together with:

(i) A detailed description of applicant's outstanding and proposed securities and liabilities, showing amount (face value and number), interest or dividend rate, dates of issue and maturity, voting privileges, and principal terms and conditions applicable to each.

(ii) The manner in which applicant proposes to dispose of securities by private sale, competitive bidding or otherwise; the persons, if known, to whom they will be sold or issued together with letters of intent, if any, and if not known, the class or classes of such persons.

(iii) A statement showing for each proposed issue, by total amount and by unit, the estimated sale price and estimated net proceeds to the applicant.

(iv) An itemized statement of estimated expenses, fees, and commissions to be paid by applicant in connection with each proposed issue.

(v) A statement showing whether the consent of any holder of any security is necessary to permit the issuance of the additional securities proposed, and whether, as to the proposed issue of securities, a like restriction is to be made applicable to any securities issued thereafter.

(vi) Statement of anticipated cash flow, including provision during the period of construction and the first 3 full years of operation of proposed facilities for interest requirements, dividends, and capital retirements.

(vii) Statement showing, over the life of each issue, the annual amount of securities which applicant expects to retire through operation of a sinking fund or other extinguishment of the obligation.

(viii) A balance sheet and income statement (12 months) of most recent date available.

(ix) Comparative pro forma balance sheets and income statements for the period of construction and each of the first 3 full years of operation, giving effect to the proposed construction and proposed financing of the project.

(x) Conformed copies of all agreements, contracts, mortgages, deeds of trust, indentures, agreements to advance materials or supplies or render services in return for applicant's securities, underwriting agreements, and other agreements or documents of a similar nature.

(xi) Conformed copies of all reports, letters, or other documents, submitted by applicant to underwriters, insurance companies, or others regarding financing, including business studies, forecasts of earnings, and other similar financial or accounting reports, statements, or documents.

(xii) Conformed copies of all applications and supporting exhibits, registration statements, or other similar submittals, if any, to the Securities and Exchange Commission, including all supplements, changes or modifications of the above.

(xiii) Any additional data and information upon which applicant proposes to rely in showing the adequacy and availability to it of resources for financing its proposed project.

(15) *Exhibit M – Construction, operation, and management.* A concise statement setting forth arrangements for supervision, management, engineering, accounting, legal, or other similar service to be rendered in connection with the construction or operation of the project, if not to be performed by employees of applicant, including reference to any existing or contemplated agreements therefor, together with:

(i) A statement showing affiliation between applicant and any parties to such agreements or arrangements. See Exhibit D, paragraph (a)(4) of this section.

(ii) Conformed copies of all construction, engineering, management, and other similar service agreements or contracts in any way operative with respect to construction, operation, or financing of facilities which are the subject of the application or will be applicable under system operations.

(16) *Exhibit N—Revenues—Expenses—Income.* When the estimated revenues and expenses related to a proposed facility will significantly affect the operating revenues or operating expenses of an applicant, there shall be submitted a system-wide statement for the last year preceding the proposed construction or service and pro forma system-wide and incremental statements for each of the first three full years of operation of the proposed facilities, showing:

(i) Gas system annual revenues and volumes of natural gas related thereto, subdivided by classes of service, and further subdivided by sales to direct industrial customers, sales to other gas utilities, and other sales, indicating billing quantities used for computing charges, e.g., actual demands, billing demands, volumes, heat-content adjustment or other determinants. In addition, if enlargement or extension of facilities is involved, the revenues attributable solely to the proposed facilities shall be stated separately, and the basis and data used in such computation shall be clearly shown.

(ii) Gas system annual operating expenses classified in accordance with the Commission's Uniform System of Accounts for Natural Gas Companies; the annual depreciation, depletion, taxes, utility income, and resulting rate of return on net investment in gas plant including working capital. In addition if enlargement or extension of facilities is involved, the cost of service attributable solely to the proposed facilities shall be stated separately with supporting data.

(iii) When the data required in paragraphs (a)(16)(i) and (ii) of this section is not submitted, applicant shall provide in lieu

thereof a statement in sufficient detail to show clearly the effect on the operating revenues and operating expenses of the estimated revenues and expenses related to the proposed facility.

(17) *Exhibit O – Depreciation and depletion.* Depreciation and depletion rates to be established, the method of determination and the justification therefor.

(18) *Exhibit P– Tariff.* (i) A statement of the rates to be charged for the proposed sales or service, including: (a) Identification of the applicable presently effective rate schedules, when no additional tariff filings will be required, or (b) when changes are required in applicant's presently effective tariff, or if applicant has no tariff, pro forma copies of appropriate changes in or additions to the effective tariff or a pro forma copy of the new gas tariff proposed, or (c) when a new rate is proposed, a statement explaining the basis used in arriving at the proposed rate. Such statement shall clearly show whether such rate results from negotiation, cost-of-service determination, competitive factors or others, and shall give the nature of any studies which have been made in connection therewith.

(ii) When new rates or changes in present rates are proposed or when the proposed facilities will result in a material change in applicant's average cost of service, such statement shall be accompanied by supporting data showing:

(a) System cost of service for the first calendar year of operation after the proposed facilities are placed in service.

(b) An allocation of such costs to each particular service classification, with the basis for each allocation clearly stated.

(c) The proposed rate base and rate of return.

(d) Gas operating expenses, segregated functionally by accounts.

(e) Depletion and depreciation.

(f) Taxes with the basis upon which computed.

(b) *Additional exhibits.* Applicant shall submit additional exhibits necessary to support or clarify its application. Such exhibits shall be identified and designated as provided by § 157.6(b)(6).

(c) *Additional information.* Upon request by the Secretary, prior to or during hearing upon the application, applicant shall submit such additional data, information, exhibits, or other detail as may be specified. An original and 7 conformed copies of such additional information shall be furnished to the Commission. The Commission reserves the right to request additional copies.

(d) *Availability of Commission staff for advice prior to formal filing.* Prior to filing an application, any person may informally confer with the staff of the Commission to obtain advice on any problem of statement or presentation of an application or any part thereof.

(Secs. 3(e), 7, 8, 82 Stat. 721, 725 (49 U.S.C. 1672, 1676, 1677; Natural Gas Act (15 U.S.C. 717-717w); Natural Gas Policy Act (15 U.S.C. 3301-3432); Department of Energy Organization Act (42 U.S.C. 7101-7352); E.O. 12009, 3 CFR 142)

[17 FR 7387, Aug. 14, 1952]

EDITORIAL NOTE: FOR FEDERAL REGISTER citations affecting § 157.14, see the List of CFR Sections Affected in the Finding Aids section of this volume.

§ 157.15 Requirements for applications covering acquisitions.

An application for a certificate authorizing acquisition of facilities, in addition to complying with the applicable provisions of §§ 157.5 through 157.14, shall include a statement showing:

(a) The exact legal name of the vendor, lessor, or other party in interest (hereinafter referred to as "vendor") the State or other laws under which vendor was organized, location of vendor's principal place of business, and a description of the business, operation or property of vendor covered by the application.

(b) Any certificate from the Commission, held by vendor, relating directly to the facilities which applicant seeks to acquire,

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citing the order, date thereof, docket designation, and title of the proceeding; reference to and designation of any companion applications by vendor for permission and approval pursuant to section 7(b) of the Natural Gas Act.

(c) The manner in which the facilities are to be acquired, the consideration to be paid, the method of arriving at the amount thereof, and anticipated expenses in addition to the consideration.

(d) The facilities to be acquired, their present use, their proposed use after acquisition, and whether they constitute all of vendor's facilities.

(e) Any franchise, license, or permit respecting the facilities involved, showing expiration date thereof, and the effect of the proposed acquisition thereon.

[17 FR 7389, Aug. 14, 1952]

§ 157.16 Exhibits relating to acquisitions.

In addition to the exhibits required by § 157.14, every application involving acquisition of facilities shall be accompanied by the exhibits listed below. Together with each exhibit applicant shall set forth a full and complete explanation of the data submitted, the manner in which it was obtained, and the reasons for the conclusions which are derived therefrom. If the Commission determines that a formal hearing upon the application is required or that testimony and hearing exhibits should be filed, the Secretary shall promptly notify the applicant that submittal of all the exhibits and testimony of all witnesses to be sponsored by the applicant in support of his case-in-chief is required. Submittal of such exhibits and testimony shall be within 20 days from the date of the Secretary's notice, or such longer time as he shall specify. Section 157.6(a) shall govern the number of copies to be furnished to the Commission. Interveners and persons becoming interveners after the date of the Secretary's notice shall be advised by the applicant of the afore-specified exhibits and testimony, and shall be furnished with copies upon request.

(a) *Exhibit Q – Effect of acquisition on existing contracts and tariffs.* A statement showing the effect of the proposed transaction upon any agreements for the purchase, sale, or interchange of natural gas, and upon any rate schedules or tariffs on file with this Commission, together with pro forma rate schedule sheets, notices of cancellation, or other tariff filings required to be made with this Commission.

(b) *Exhibit R – Acquisition contracts.* A summary statement of all contracts, agreements or undertakings relating to the proposed acquisition, including;

(1) A conformed copy of each contract or other agreement covering or relating to the acquisition of the facilities.

(2) The names and addresses of all persons employed or to be employed concerning the transaction, including engineering, financial accounting, legal, or other services, and the compensation, fees, or other payments, paid or payable, to such persons.

(3) A disclosure of affiliation between applicant and vendor or between either of them and any other party in interest in the proposed acquisition. See Exhibit D, § 157.14(a)(4).

(c) *Exhibit S – Accounting.* A statement showing:

(1) The amounts recorded upon the books of the vendor as being applicable to the facilities to be acquired, and the related depreciation, depletion, and amortization reserves.

(2) The original cost of the facilities to be acquired, segregated by accounts prescribed in the Commission's Uniform System of Accounts for Natural Gas Companies; the method by which the original cost was determined; and whether such statement of original cost has been approved by any regulatory body.

(3) If the original cost has not been determined, an estimate thereof, based upon record or data of vendor or its predecessors, together with an explanation of the manner in which such estimate was made and the name and address of the present custodian of all existing pertinent records and data.

(4) The depreciation, depletion, and amortization reserve requirements applicable to the original cost of the facilities to be acquired, estimated service lives, the approximate average age of the facilities to which the depreciation reserve applies, the amortization period, and the depletion rates and estimated gas reserves upon which accruals to the depletion reserve are based.

(5) The amount at which applicant proposes to record the facilities upon its books; the amount of the original cost to be recorded, the depreciation, depletion, and amortization reserves; and the acquisition adjustments, if any, together with applicant's proposed disposition of all adjustments.

(6) Duplicate facilities to be acquired and retired, property which must be extensively rehabilitated, including a clear description of such property, the additional costs to be incurred, and the accounting therefor proposed.

(7) A balance sheet of the company to be acquired as of the most recent date available, if the acquisition involved is by purchase of capital stock and liquidation of the acquired company.

(8) A pro forma consolidating balance sheet, as of the date of the merger if the acquisition is by merger, showing the merging of the accounts and the adjustments relating thereto.

[17 FR 7389, Aug. 14, 1952, as amended by Order 280, 29 FR 4879, Apr. 7, 1964]

§ 157.17 Applications for temporary certificates in cases of emergency.

In cases of emergency and pending the determination of any application on file with the Commission for a certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act, application may be made for a temporary certificate authorizing the construction and operation of such extensions of existing facilities, such interconnections of pipeline systems, or such sales of natural gas as may be required to assure maintenance of adequate service, or to serve particular customers. Such application shall be submitted in writing, shall be subscribed and

verified by a responsible officer of applicant having knowledge of the facts, and shall state clearly and specifically the exact character of the emergency, the proposed method of meeting, it, and the facts claimed to warrant issuance of a temporary certificate.

[Order 280, 29 FR 4879, Apr. 7, 1964]

§ 157.18 Applications to abandon facilities or service; exhibits.

Applications for an order authorizing abandonment of facilities or service pursuant to section 7(b) of the Natural Gas Act shall contain a statement setting forth in detail the reasons for the abandonment and shall contain the exhibits listed below. Together with each exhibit, applicant shall set forth a full and complete explanation of the data submitted, the manner in which it was obtained, and the reasons for the conclusions which are derived therefrom. The Secretary may, in addition, require that the testimony of all witnesses to be presented by the applicant be filed together with all exhibits upon which applicant will base its case-in-chief.

(a) *Exhibit T—Related applications.* A statement showing:

(1) The docket numbers of the prior proceedings in which the facilities or services sought to be abandoned were certificated.

(2) The docket numbers of related applications pending before or which have been authorized by the Commission with an explanation of the interrelationship of those applications with the instant application.

(b) *Exhibit U—Contracts and other agreements.* A conformed copy of each contract or other agreement pertaining directly or indirectly to the abandonment of facilities or service, including all agreements which influenced applicant to seek the abandonment and all agreements which are dependent upon the approval of the proposed abandonment.

(c) *Exhibit V—Flow diagram showing daily design capacity and reflecting operation of applicant's system after abandonment.* A flow diagram showing daily design capacity and reflecting operating conditions of applicant's system after abandonment of facilities on that segment of the system affected by the abandonment, including the following:

- (1) Diameter, wall thickness, and length of pipe remaining.
- (2) For each remaining compressor station, the size, type and number of compressor units, horsepower required, horse power installed, volume of gas to be used as fuel, suction and discharge pressures, and compression ratio.
- (3) Pressures and volumes of gas at the main line inlet and outlet connections at each compressor station.
- (4) Pressures and volumes of gas at each intake and takeoff point and at the beginning and terminus of all remaining facilities.

(d) *Exhibit W—Impact on customers whose service will be terminated.* A statement indicating the availability of natural gas from other sources to applicant's customers whose service will be terminated by the abandonment and a statement showing the economic effect of the abandonment on applicant's customers. If no other natural gas is available, indicate the availability of other fuels to those customers and explain why the abandonment of service to each customer is permitted by the public convenience and necessity.

(e) *Exhibit X—Effect of the abandonment on existing tariffs.* Statement showing the effect of the proposed abandonment upon any rate schedules or tariffs on file with this Commission, together with pro forma rate schedule sheets, notices of cancellation, or other tariff filings required to be made with this Commission.

(f) *Exhibit Y—Accounting treatment of abandonment.* Concisely describe the changes of property, indicating the cost of property to be abandoned in place, the cost of property to be removed

and salvaged, the proposed disposition of salvaged material, and a description of equipment to be relocated setting forth its cost, its proposed new location, and the extent of rehabilitation required. Include the information required below.

(1) State the proposed accounting treatment for property changes, showing, for example, retirements by primary plant accounts, cost of removal, salvage realized for materials and equipment sold, original cost of reusable materials and equipment recovered (see Account 154 of the Uniform System of Accounts), and maintenance costs for reconditioning of reusable materials and equipment.

(2) If the abandonment will be by sale of property, describe the property to be sold, together with the proposed accounting treatment as required by paragraph F of Gas Plant Instruction 5 of the Uniform System of Accounts. Applicant may use pro forma accounting entries based on estimated amounts, provided that upon consummation of the sale he must file proposed accounting entries in conformity with the requirements of the Uniform System of Accounts. If the proposed sale will result in a taxable gain to the applicant, indicate the amount of federal and state income taxes to be allocated to the gain. If no allocation is to be made, explain the reasons.

(3) State the amount of accumulated deferred income taxes attributable to the property to be abandoned. Indicate the proposed accounting treatment of those accumulated deferred taxes.

(g) *Exhibit Z—Location of facilities.* Unless shown on Exhibit V or elsewhere, a geographic map of suitable scale and detail showing, and appropriately differentiating between, all of the facilities proposed to be abandoned and the other existing facilities of applicant, the operation or capacity of which will be directly affected by the facilities to be abandoned. This map shall clearly show the relationship of the facilities to be abandoned to the applicant's overall system and shall include:

(1) Location, length and size of pipelines.

(2) Location and size (rated horsepower) or compressor stations.

(3) Location and designation of each point of connection of existing facilities with (i) main line industrial and other consumers, pipeline or distribution companies and municipalities, indicating towns and communities served at wholesale or retail and (ii) gas-producing and storage fields, or other sources of gas supply. Designate on the map those facilities and services proposed to be abandoned.

[Order 280, 29 FR 4879, Apr. 7, 1964, as amended by Order 295, 30 FR 4130, Mar. 30, 1965]

§ 157.20 General conditions applicable to certificates.

Such of the following terms and conditions, among others, as the Commission shall find is required by the public convenience and necessity, shall attach to the issuance of each certificate and to the exercise of the rights granted thereunder.

(a) The certificate shall be void and without force or effect unless accepted in writing by applicant within 30 days from the issue date of the order issuing such certificate: *Provided, however,* That when an application for re-hearing of such order is filed in accordance with section 19 of the Natural Gas Act, such acceptance shall be filed within 30 days from the issue date of the order of the Commission upon the application for rehearing or within 30 days from the date on which such application may be deemed to have been denied when the Commission has not acted on such application within 30 days after it has been filed: *Provided further,* That when a petition for review is filed in accordance with the provisions of section 19 of the Natural Gas Act, such acceptance shall be filed within 30 days after final disposition of the judicial review proceedings thus initiated.

(b) Any authorized construction, extension, or acquisition shall be completed and in actual operation by applicant and any authorized operation, service, or sale shall be actually undertaken and regularly performed by applicant within (period of time to be specified by the Commission in each order) from the issue date of the Commission's order issuing the certificate.

(c) Applicant shall file with the Commission, in writing and under oath, an original and four conformed copies, and, upon request, shall furnish an intervener with a single copy, of the following:

(1) Within ten days after the bona fide beginning of construction, notice of the date of such beginning; (2) each three months after filing notice of commencing construction, a progress report showing the exact status of authorized construction; (3) within ten days after authorized facilities have been constructed and placed in service or any authorized operation, sale, or service has commenced, notice of the date of such placement and commencement and (4) within six months after authorized facilities have been constructed, a statement showing, on the basis of all costs incurred to that date and estimated to be incurred for final completion of the project, the cost of constructing authorized facilities, such total costs to be classified according to the estimates submitted in the certificate proceeding and compared therewith and any significant differences explained.

(d) With respect to an acquisition authorized by the certificate, applicant shall file with the Commission, in writing and under oath, an original and four conformed copies of the following:

(1) Each 3 months after the issue date of the Commission's order issuing this certificate, a progress report showing the exact status of the acquisition; (2) within 10 days after acquisition and the beginning of authorized operations, notice of the dates of acquisition and the beginning of operations; and (3) within 6 months after consummation of the acquisition, a statement showing and explaining the cause for any differences between the actual cost of the facilities acquired and the estimates of cost relied upon by applicant in the proceeding in which the certificate is issued.

(e) The certificate issued to applicant is not transferable in any manner and shall be effective only so long as applicant continues the operations authorized by the order issuing such certificate and in accordance with the provisions of the Natural Gas Act, as well as applicable rules, regulations, and orders of the Commission.

(f) The certificate herein issued shall be without force and effect unless the fees prescribed by § 159.2(b) and § 159.2(d), if any, of the Regulations Under the Natural Gas Act have been paid in accordance with the requirements thereof.

(g) In the interest of safety and reliability of service, facilities authorized by the certificate shall not be operated at pressures exceeding the maximum operating pressure set forth in Exhibit G-II to the application as it may be amended prior to issuance of the certificate. In the event the applicant thereafter wishes to change such maximum operating pressure it shall file an appropriate petition for amendment of the certificate. Such petition shall include the reasons for the proposed change. Nothing contained herein authorizes a natural gas company to operate any facility at a pressure above the maximum prescribed by state law, if such law requires a lower pressure than authorized hereby.

(Sec. 20, 52 Stat. 832; 15 U.S.C. 717s)

[17 FR 7389, Aug. 14, 1952, as amended by Order 280, 29 FR 4879, Apr. 7, 1964; Order 317, 31 FR 432, Jan. 13, 1966; Order 324, 31 FR 9348, July 8, 1966]

§ 157.21 Abandonment of purchases.

(a) Except as provided in paragraph (c) of this section, a purchaser subject to the Commission's jurisdiction under the Natural Gas Act is authorized, upon 30-days written notice to the seller, or any longer notice period required by contract, to abandon purchases of natural gas from any first seller or pipeline:

(1) Permanently, under a contract that has expired, or

(2) To the extent that the obligation of the purchaser to take or pay for gas (or both), or of the seller to deliver gas, is unilaterally reduced, suspended or terminated by either party in accordance with a provision of an unexpired contract.

(b) A purchaser subject to the Commission's jurisdiction under the Natural Gas Act is authorized to abandon purchases of gas from any first seller or pipeline:

(1) Permanently, by agreement of the parties to such abandonment, or

(2) To the extent that the obligation of the purchaser to take or pay for gas (or both) is reduced, suspended or terminated by agreement of the parties.

(c) A purchaser that is an interstate pipeline may not unilaterally abandon purchases of gas under paragraph (a) of this section unless it has a blanket certificate of public convenience and necessity authorizing transportation of natural gas under § 284.221 of this chapter.

(d) A purchaser that permanently abandons purchases of gas under this section must file a report with the Commission within 30 days of the date that purchases are terminated providing the following information:

(1) The name of the former seller;

(2) A description of the certificate authority under which the former seller sold the abandoned gas;

(3) A description of the contractual authority under which the purchases were terminated; and

(4) If the abandonment is partial, a description of the acreage from which purchases were terminated and acreage from which purchases continue.

(e) For purposes of this section, the term "first seller" means any seller that engages in a sale of natural gas that is a "first sale" under section 2(21) of the Natural Gas Policy Act of 1978.

[Order 490, 53 FR 4133, Feb. 12, 1988]

EFFECTIVE DATE NOTE: At 53 FR 4133, Feb. 12, 1988, § 157.21 was added, effective April 12, 1988.

**PART 380—REGULATIONS IMPLEMENTING THE
NATIONAL ENVIRONMENTAL POLICY ACT**

Sec.

380.1 Purpose

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**APPENDIX A—GUIDELINES FOR THE PREPARATION OF
ENVIRONMENTAL REPORTS FOR APPLICATIONS UNDER THE
NATURAL GAS ACT, AS SPECIFIED IN §380.3 OF THE
COMMISSION'S REGULATIONS.**

AUTHORITY: National Environmental Policy Act of
1969, 42 U.S.C. 4321-4370a (1982); Department of
Energy Organization Act, 42 U.S.C. 7101-7352 (1982);
E.O. 12009, 3 CFR 1978 Comp., p. 142.

Source: Order 486, 52 FR 47910, Dec. 17, 1987, unless
otherwise noted.

§380.1 Purpose.

The regulations in this part implement the Federal Energy Regulatory Commission's procedures under the National Environmental Policy Act of 1969. These regulations supplement the regulations of the Council on Environmental Quality, 40 CFR Parts 1500 through 1508 (1986). The Commission will comply with the regulations of the Council on Environmental Quality except where those regulations are inconsistent with the statutory requirements of the Commission.

§380.2 Definitions and terminology.

For purposes of this part—

(a) "Categorical exclusion" means a category of actions described in §380.4, which do not individually or cumulatively have a significant effect on the human environment and which the Commission has found to have no such effect and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. The Commission may decide to prepare environmental assessments for the reasons stated in §380.4(b).

(b) "Commission" means the Federal Energy Regulatory Commission.

(c) "Council" means the Council on Environmental Quality.

(d) "Environmental assessment" means a concise public document for which the Commission is responsible that serve to:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid the Commission's compliance with NEPA when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary. Environmental assessments must include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E) of NEPA, of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

(e) "Environmental impact statement" (EIS) means a detailed written statement as required by section 102(2)(C) of NEPA. DEIS means a draft EIS and FEIS means a final EIS.

(f) "Environmental report" or ER means that part of an application submitted to the Commission by an applicant for authorization of a proposed action which includes information concerning the environment, the applicant's analysis of the environmental impact of the action, or alternatives to the action required by this or other applicable statutes or regulations.

(g) "Finding of no significant impact" (FONSI) means a document by the Commission briefly presenting the reason why an action, not otherwise excluded by §380.4, will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared. It must include the environmental assessment or a summary of it and must note other environmental documents related to it. If the assessment is included, the FONSI need not repeat any of the discussion in the assessment but may incorporate it by reference.

§380.3 Environmental information to be supplied by an applicant.

(a) An applicant must submit information as follows:

(1) For any proposed action identified in §§380.5 and 380.6, an environmental report with the proposal as prescribed in paragraph (c) of this section.

(2) For any proposal not identified in paragraph (a)(1) of this section, any environmental information that the Commission may determine is necessary for compliance with these regulations, the regulations of the Council, NEPA and other Federal laws such as the Endangered Species Act, the National Historic Preservation Act or the Coastal Zone Management Act.

(b) An applicant must also:

(1) Provide all necessary or relevant information to the Commission;

(2) Conduct any studies that the Commission staff considers necessary or relevant to determine the impact of the proposal on the human environment and natural resources;

(3) Consult with appropriate Federal, regional, State, and local agencies during the planning stages of the proposed action to ensure that all potential environmental impacts are identified. (The specific requirements for consultation on hydropower projects are contained in §4.38 of this chapter and in section 4(a) of the Electric Consumers Protection Act, Pub. L. No. 99-495, 100 Stat. 1243, 1246 (1986));

(4) Submit applications for all Federal and State approvals as early as possible in the planning process; and

(5) Notify the Commission staff of all other Federal actions required for completion of the proposed action so that the staff may coordinate with other interested Federal agencies.

(c) *Content of an applicant's environmental report for specific proposals*—(1) *Hydropower projects*. The information required for specific project applications under Part 4 of this chapter.

(2) *Natural gas projects*. (i) For any application filed under the Natural Gas Act for any proposed action identified in §§380.5 or 380.6, except for prior notice filings under §157.208, as described in §380.5(b), the information identified in Appendix A of this part.

(ii) For prior notice filings under §157.208, the report described by §157.208(c)(11) of this chapter.

§380.4 Projects or actions categorically excluded.

(a) *General rule*. Except as stated in paragraph (b) of this section, neither an environmental assessment nor an environmental impact statement will be prepared for the following projects or actions:

(1) Procedural, ministerial, or internal administrative and management actions, programs, or decisions, including procurement, contracting, personnel actions, correction or clarification of filings or orders, and acceptance, rejection and dismissal of filings;

(2)(i) Reports or recommendations on legislation not initiated by the Commission, and

(ii) Proposals for legislation and promulgation of rules that are clarifying, corrective, or procedural, or that do not substantially change the effect of legislation or regulations being amended;

(3) Compliance and review actions, including investigations (jurisdictional or otherwise), conferences, hearings, notices of probable violation, show cause orders, and adjustments under section 502(c) of the Natural Gas Policy Act of 1978 (NGPA);

(4) Review of grants or denials by the Department of Energy (DOE) of any adjustment request, and review of contested remedial orders issued by DOE;

(5) Information gathering, analysis, and dissemination;

(6) Conceptual or feasibility studies;

(7) Actions concerning the reservation and classification of United States lands as water power sites and other actions under section 24 of the Federal Power Act;

(8) Transfers of water power project licenses and transfers of exemptions under Part I of the Federal Power Act and Part 9 of this chapter;

(9) Issuance of preliminary permits for water power projects under Part I of the Federal Power Act and Part 4 of this chapter;

(10) Withdrawals of applications for certificates under the Natural Gas Act, or for water power project preliminary permits, exemptions, or licenses under Part I of the Federal Power Act and Part 4 of this chapter;

(11) Actions concerning annual charges or headwater benefits, charges for water power projects under Parts 11 and 13 of this chapter and establishment of fees to be paid by an applicant for a license or exemption required to meet the terms and conditions of section 30(c) of the Federal Power Act;

(12) Approval for water power projects under Part I of the Federal Power Act, of "as built" or revised drawings or exhibits that propose no changes to project works or operations or that reflect changes that have previously been approved or required by the Commission;

(13) Surrender and amendment of preliminary permits, and surrender of water power licenses and exemptions where no project works exist or ground disturbing activity has occurred and amendments to water power licenses and exemptions that do not require ground disturbing activity or changes to project works or operation;

(14) Exemptions for small conduit hydroelectric facilities as defined in §4.30(b)(26) of this chapter under Part I of the Federal Power Act and Part 4 of this chapter;

(15) Electric rate filings submitted by public utilities under sections 205 and 206 of the Federal Power Act, the establishment of just and reasonable rates, and confirmation, approval, and disapproval of rate filings submitted by Federal power marketing agencies under the Pacific Northwest Electric Power Planning and Conservation Act, the Department of Energy Organization Act, and DOE Delegation Order No. 0204-108.

(16) Approval of actions under sections 4(b), 203, 204, 301, 304, and 305 of the Federal Power Act relating to issuance and purchase of securities, acquisition or disposition of property, merger, interlocking directorates, jurisdictional determinations and accounting orders;

(17) Approval of electrical interconnections and wheeling under sections 202(b), 210, 211, and 212 of the Federal Power Act, that would not entail:

(i) Construction of a new substation or expansion of the boundaries of an existing substation;

(ii) Construction of any transmission line that operates at more than 115 kilovolts (KV) and occupies more than ten miles of an existing right-of-way; or

(iii) Construction of any transmission line more than one mile long if located on a new right-of-way;

(18) Approval of changes in land rights for water power projects under Part I of the Federal Power Act and Part 4 of this chapter. If no construction or change in land use is either proposed or known by the Commission to be contemplated for the land affected;

(19) Approval of proposals under Part I of the Federal Power Act and Part 4 of this chapter to authorize use of water power project lands or waters for gas or electric utility distribution lines, radial sub-transmission lines, communications lines and cables, storm drains, sewer lines not discharging into project waters, water mains, piers, landings, boat docks, or similar structures and facilities, landscaping or embankments, bulkheads, retaining walls, or similar shoreline erosion control structures;

(20) Action on applications for exemption under section 1(c) of the Natural Gas Act;

(21) Approvals of blanket certificate applications and prior notice filings under §157.204 and §§157.209 through 157.218 of this chapter;

(22) Approvals of blanket certificate applications under §§284.221 through 284.224 of this chapter;

(23) Producers' applications for the sale of gas filed under §§157.23 through 157.29 of this chapter;

(24) Approval under section 7 of the Natural Gas Act of taps, meters, and regulating facilities located completely within an existing natural gas pipeline right-of-way or compressor station if company records show

the land use of the vicinity has not changed since the original facilities were installed, and no significant nonjurisdictional facilities would be constructed in association with construction of the interconnection facilities;

(25) Review of natural gas rate filings, including any curtailment plans other than those specified in §380.5(b)(5), and establishment of rates for transportation and sale of natural gas under sections 4 and 5 of the Natural Gas Act and sections 311 and 401 through 404 of the Natural Gas Policy Act of 1978;

(26) Review of approval of oil pipeline rate filings under Parts 340 and 341 of this chapter;

(27) Sale, exchange, and transportation of natural gas under sections 4, 5 and 7 of the Natural Gas Act that requires no construction of facilities;

(28) Abandonment in place of a minor natural gas pipeline (short segments of buried pipe of 6-inch inside diameter or less), or abandonment by removal of minor surface facilities such as metering stations, valves, and tops under section 7 of the Natural Gas Act so long as appropriate erosion control and site restoration takes place;

(29) Abandonment of service under any gas supply contract pursuant to section 7 of the Natural Gas Act;

(30) Approval of filing made in compliance with the requirements of a certificate for a natural gas project under section 7 of the Natural Gas Act or a preliminary permit, exemption, license, or license amendment order for a water power project under Part I of the Federal Power Act;

[Order 486, 52 FR 47910, Dec. 17, 1987, as amended at 53 FR 8177, Mar. 14, 1988; Order 486-B, 53 FR 26437, July 13, 1988]

§380.5 Actions that require an environmental assessment.

(a) An environmental assessment will normally be prepared first for the actions identified in this section. Depending on the outcome of the environmental assessment, the Commission may or may not prepare an environmental impact statement. However, depending on the location or scope of the proposed action, or the resources affected, the Commission may in specific circumstances proceed directly to prepare an environmental impact statement.

(b) The projects subject to an environmental assessment are as follows:

(1) Except as identified in §§380.4, 380.6 and 2.55 of this chapter, authorization for the site of new gas import/export facilities under DOE Delegation No. 0204-112 and authorization under section 7 of the Natural Gas Act for the construction, replacement, or abandonment of compression, processing, or interconnecting facilities, onshore and offshore pipelines, metering facilities, LNG peak-shaving facilities, or other facilities necessary for the sale, exchange, storage, or transportation of natural gas;

(2) Prior notice filings under §157.208 of this chapter for the rearrangement of any facility specified in §§157.202 (b)(3) and (6) of this chapter or the acquisition, construction, or operation of any eligible facility as specified in §§157.202 (b)(2) and (3) of this chapter;

(3) Abandonment or reduction of natural gas service under section 7 of the Natural Gas Act unless excluded under §380.4 (a)(21), (28) or (29);

(4) Except as identified in §380.6, conversion of existing depleted oil or natural gas fields to underground storage fields under section 7 of the Natural Gas Act.

(5) New natural gas curtailment plans, or any amendment to an existing curtailment plan under section 4 of the Natural Gas Act and sections 401 through 404 of the Natural Gas Policy Act of 1978 that has a major effect on an entire pipeline system;

(6) Licenses under Part I of the Federal Power Act and Part 4 of this chapter for construction of any water power project—existing dam;

(7) Exemptions under section 405 of the Public Utility Regulatory Policies Act of 1978, as amended, and §§4.30(b)(27) and 4.101-4.106 of this chapter for small hydroelectric power projects of 5 MW or less;

(8) Licenses for additional project works at licensed projects under Part I of the Federal Power Act whether or not these are styled license amendments or original licenses;

(9) Licenses under Part I of the Federal Power Act and Part 4 of this chapter for transmission lines only;

(10) Applications for new licenses under section 15 of the Federal Power Act;

(11) Approval of electric interconnections and wheeling under sections 202(b), 210, 211, and 212 of the Federal Power Act, unless excluded under §380.4(a)(17); and

(12) Regulations or proposals for legislation not excluded under §380.4(a)(2).

(13) Surrender of water power licenses and exemptions where project works exist or ground disturbing activity has occurred and amendments to water power licenses and exemptions that require ground disturbing activity or changes to project works or operations.

[Order 486, 52 FR 47910, Dec. 17, 1987; Order 486, 53 FR 4817, Feb. 17, 1988; 53 FR 8177, Mar. 14, 1988; Order 486-B, 53 FR 26437, July 13, 1988]

§380.6 Actions that require an environmental impact statement.

(a) Except as provided in paragraph (b) of this section, an environmental impact statement will normally be prepared first for the following projects:

(1) Authorization under sections 3 or 7 of the Natural Gas Act and DOE Delegation Order No. 0204-112 for the siting, construction, and operation of jurisdictional liquefied natural gas import/export facilities used wholly or in part to liquefy, store, or regasify liquefied natural gas transported by water;

(2) Certificate applications under section 7 of the Natural Gas Act to develop an underground natural gas storage facility except where depleted oil or natural gas producing fields are used;

(3) Major pipeline construction projects under section 7 of the Natural Gas Act using right-of-way in which there is no existing natural gas pipeline; and

(4) Licenses under Part I of the Federal Power Act and Part 4 of this chapter for construction of any unconstructed water power project.

(b) If the Commission believes that a proposed action identified in paragraph (a) of this section may not be a major Federal action significantly affecting the quality of the human environment, an environmental assessment, rather than an environmental impact statement, will be prepared first. Depending on the outcome of the environmental assessment, an environmental impact statement may or may not be prepared.

(c) An environmental impact statement will not be required if an environmental assessment indicates that a proposal has adverse environmental affects and the proposal is not approved.

[Order 486, 52 FR 47910, Dec. 17, 1987, as amended at 53 FR 8177, Mar. 14, 1988; Order 486-B, 53 FR 26437, July 13, 1988]

§380.7 Format of an environmental impact statement.

In addition to the requirements for an environmental impact statement prescribed in 40 CFR 1502.10 of the regulations of the Council, an environmental impact statement prepared by the Commission will include a section on the literature cited in the environmental impact statement and a staff conclusion section. The staff conclusion section will include summaries of:

- (a) The significant environmental impacts of the proposed action;
- (b) Any alternative to the proposed action that would have a less severe environmental impact or impacts and the action preferred by the staff;
- (c) Any mitigation measures proposed by the applicant, as well as additional mitigation measures that might be more effective;
- (d) Any significant environmental impacts of the proposed action that cannot be mitigated; and
- (e) References to any pending, completed, or recommended studies that might provide baseline data or additional data on the proposed action.

§380.8 Preparation of environmental documents.

The preparation of environmental documents, as defined in §1508.10 of the regulations of the Council, on hydroelectric projects, is the responsibility of the Commission's Office of Hydropower Licensing, 400 First Street NW., Washington, DC 20426, (202) 376-9171. The preparation of environmental documents on natural gas projects is the responsibility of the Commission's Office of Pipeline and Producer Regulation, (202) 357-850, 825 North Capitol Street NW., Washington, DC 20426.

Persons interested in status reports or information on environmental impact statements or other elements of the NEPA process, including the studies or other information the Commission may require on these projects, can contact these sections.

§380.9 Public availability of NEPA documents and public notice of NEPA related hearings and public meetings.

(a)(1) The Commission will comply with the requirements of 40 CFR 1506.6 of the regulations of the Council for public involvement in NEPA.

(2) If an action has effects of primarily local concern, the Commission may give additional notice in a Commission order.

(b) The Commission will make environmental impact statements, environmental assessments, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C. 552 (1982)). The exclusion in the Freedom of Information Act for interagency memoranda is not applicable where such memoranda transmit comments of Federal agencies on the environmental impact of the proposed action. Such materials will be made available to the public at the Commission's Public Reference Room at 825 North Capitol Street NW., Room 1000, Washington, DC 20426 at a fee and in the manner described in Part 388 of this chapter. A copy of an environmental impact statement or environmental assessment for hydroelectric projects may also be made available for inspection at the Commission's regional office for the region where the proposed action is located.

§380.10 Participation in Commission proceedings.

(a) *Intervention proceedings involving a party or parties*—(1) In addition to submitting comments on the NEPA process and NEPA related documents, any person may file a motion to intervene in a Commission proceeding dealing with environmental issues under the terms of §385.214 of this chapter. Any person who files a motion to intervene on the basis of a draft environmental impact statement will be deemed to have filed a timely motion, in accordance with §385.214, as long as the motion is filed within the comment period for the draft environmental impact statement.

(ii) Any person that is granted intervention after petitioning becomes a party to the proceeding and accepts the record as developed by the parties as of the time that intervention is granted.

(2)(i) *Issues not set for trial-type hearing.* An intervenor who takes a position on any environmental issue that has not yet been set for hearing must file a timely motion with the Secretary containing an analysis of its position on such issue and specifying any differences with the position of Commission staff or an applicant upon which the intervenor wishes to be heard at a hearing.

(ii) *Issues set for trial-type hearing.* (A) Any intervenor that takes a position on an environmental issue set for hearing may offer evidence for the record in support of such position and otherwise participate in accordance with the Commission's Rules of Practice and Procedure. Any intervenor must specify any differences from the staff's and the applicant's positions.

(B) To be considered, any facts or opinions on an environmental issue set for hearing must be admitted into evidence and made part of the record of the proceeding.

(b) *Rulemaking proceedings.* Any person may file comments on any environmental issue in a rulemaking proceeding.

§380.11 Environmental decisionmaking.

(a) *Decision points.* For the actions which require an environmental assessment or environmental impact statement, environmental considerations will be addressed at appropriate major decision points.

(1) In proceedings involving a party or parties and not set for trial-type hearing, major decision points are the approval or denial of proposals by the Commission or its designees.

(2) In matters set for trial-type hearing, the major decision points are the initial decision of an administrative law judge or the decision of the Commission.

(3) In a rulemaking proceeding, the major decision points are the Notice of Proposed Rulemaking and the Final Rule.

(b) *Environmental documents as part of the record.* The Commission will include environmental assessments, findings of no significant impact, or environmental impact statements, and any supplements in the record of the proceeding.

(c) *Application denials.* Notwithstanding any provision in this Part, the Commission may dismiss or deny an application without performing an environmental impact statement or without undertaking environmental analysis.

APPENDIX A—GUIDELINES FOR THE PREPARATION OF ENVIRONMENTAL REPORTS FOR APPLICATIONS UNDER THE NATURAL GAS ACT, AS SPECIFIED IN §380.3 OF THE COMMISSION'S REGULATIONS

These guidelines:

(1) Identify the kinds of information to be supplied by applicants to assist Federal Power Commission staff in an independent assessment of major Federal actions significantly affecting the quality of the human environment;

(2) Pertain to actions under Part 380, Chapter I, Title 18, Code of Federal Regulations;

(3) Provide the basis for the preparation of environmental reports being prepared pursuant to Part 380 by applicants for the construction of pipeline facilities under the jurisdiction of the Commission; and

(4) Provide an insight into the rationale and scope of environmental reports to assure a balanced interdisciplinary analysis of actions significantly affecting the quality of the human environment.

It is the general policy of the Federal Power Commission to expect applicants to take the following actions in carrying out their environmental evaluation responsibilities;

(5) Consult with the appropriate Federal, regional, State, and local entities during the preliminary planning stages of the proposed action to assure that all environmental factors are identified;

(6) Conduct any studies which are necessary to determine the impact of the proposed action on the human and natural resources and the measures which may be necessary to protect the values of the affected

area. These analyses of impacts upon living and nonliving elements which make up the environment shall be to the depth necessary for a valid assessment of the impacts;

(7) Utilize a sufficiently imaginative, comprehensive, interdisciplinary approach—utilizing a broad physical, biological, and social overview—during the development of the plans for a project, including the selection of its site design, and methods of construction, operation/maintenance, and abandonment; and

(8) These guidelines have been prepared to relate to a wide range of possible actions that could come before the Commission for consideration. The applicant is expected to make the detail of the environmental report commensurate with the complexity of the possible environmental impact of the proposed action. It is important to recognize that there is some duplication in the information requested. Often a section asks for an evaluation from a different viewpoint rather than absolutely new information. Upon review of the applicant's environmental report, staff may request additional information.

COMPONENTS OF AN ENVIRONMENTAL REPORT

1. *Description of proposed action.*—Provide, as an introductory paragraph, a brief description of the action under application. Then describe fully its:

1.1 *Purpose.*—Describe the primary purpose of the proposed action and such secondary purposes as water supply, navigation, flood control, low flow augmentation, recreation, fish, and wildlife. Describe how these purposes, both primary and secondary fit into existing and future utility systems or aid in meeting system

reliability or regional and national needs. List the increases in productivity and values for each purpose described, e.g., power capacity in kW and generation in kWh/year, navigation in tonnage, recreation in visitor days, water use in ft³/s and af.

1.2 *Location*.—Describe the geographical location of the action as related to other similar programs or developments in the same river basin. Locate the proposed action with respect to State boundaries, counties and major cities and, if necessary, by more specific geographical identification such as township and range; provide a map or maps of the area and such other graphic materials as are needed to locate the action.

1.3 *Land requirements*.—Locate and indicate the area and use of lands to be utilized by the proposed action and any measures, other than construction procedures, involved in its use, including clearing, borrow and spoil areas, rip-rap, settling ponds or basins, relocation or development of roads, recreation and wildlife management programs, drilling of wells for water supply or aquifer recharge, and reserving project lands for future uses. Describe the length and width of all existing, joint, or new rights-of-way required by the proposed action and any land treatment programs proposed thereon, including activities on "adjacent" lands.

1.4 *Proposed facilities*.—Provide dimensions where pertinent.

1.4.1 *Project works*.—Describe and locate on functional drawings the project works proposed for construction, including dams, dikes, reservoirs, spillways, powerhouses, switchyards, and transmission facilities, water intakes and outlets and conduits, navigation

works, visitor centers and other public use facilities, fish ladders, fish hatcheries, and fish protective facilities. Provide dimensions, elevations, data on geological foundations, and other technical data as necessary to give functional design characteristics for safety and adequacy.

1.4.2 *Reservoir*.—Describe the reservoir and its outlet works giving dimensions in capacity, elevations, area, depth; thermal stratification if present or anticipated; currents, mixing actions, and flow-through of inflowing waters as related to water densities; and locate any water intake structures by elevations and in relation to the occurrence of a reservoir thermocline.

1.4.3 *Tailwater features*.—Using a profile drawing, show elevations of the turbine or pump runners, maximum and minimum tailwaters, and of any tailrace excavations.

1.4.4 *Transmission facilities*.—Describe any transmission lines, rights-of-way, and substations existing or planned for future development, not included as part of the action under application but considered a necessary adjunct thereto.

1.5 *Construction procedures*.—Describe procedures to be taken prior to or during construction of project works such as the relocation of homes and commercial and industrial facilities, clearing, preparation of any diversion works, surveying, land acquisition and environmental planning. Provide a schedule of construction of major project works and how this will meet future power needs and avoid such limiting factors as floods, severe climatic conditions, or migrations of fish. Include schedules for needed relocations or development of transportation and

other public use facilities and methods of maintaining service during these activities. Indicate the source of the work forces, numbers involved, and their housing needs in the area.

1.6 Operational and maintenance procedures.—Describe the proposed operational modes and the reasons therefor. Show how the water resources of the area are to be utilized (provide usable reservoir storage capacities for respective purposes, area-capacity curves, hydrology data, drawdowns, and flow duration curves applicable to project operation during dry, average, and wet years). Include a discussion of the quantity and quality of water flows as they enter, pass through the project, and are released to maintain the downstream aquatic habitat; and of any diversions of water for other uses including municipal or industrial uses, or fish ladders or hatcheries. For pumped storage projects describe the daily, weekly, and seasonal exchanges of waters between upper and lower reservoirs and the water currents and temperature changes produced by this pseudo-tidal action. Include also a discussion of any pollutants (and their sources) which would be discharged as a result of the proposed action. Describe maintenance of proposed project works under normal conditions; include types of expected maintenance, and how system or area needs will be met during shutdown for maintenance. Describe capacity of project works to withstand both usual and unusual, but possible, natural phenomena and accidents (e.g., earthquakes, floods, hurricanes or tornadoes, slides); describe any related geological or structural problems, and measures to be taken to minimize problems arising from malfunctions and accidents.

1.7 *Future plans.*—Describe plans or potential for future expansion of facilities including land use and the compatibility of these plans with the proposed action.

2. *Description of the existing environment.*—Provide an overall description of existing conditions for resources which might be affected directly and indirectly by the proposed action; include a discussion of such pertinent topics as:

2.1 *Land features and uses.*—Identify present uses and describe the characteristics of the land area.

2.1.1 *Land uses.*—Describe the extent of present uses, as in agriculture, business, industry, recreation, residence, wildlife, and other uses, including the potential for development; locate major nearby transportation corridors, including roads, highways, ship channels, and aviation traffic patterns; locate transmission facilities on or near the lands affected by the proposed action and their placement (underground, surface, or overhead).

2.1.2 *Topography, physiography, and geology.*—Provide a detailed description of the topographic, physiographic, and geologic features within the area of the proposed action. Includes U.S. Geological Survey Topographic Maps, aerial photographs, and other such graphic material.

2.1.3 *Soils.*—Describe the physical and chemical characteristics of the soils. Sufficient detail should be given to allow interpretation of the nature of and fertility of the soil and stability of slopes.

2.1.4 *Geological hazards.*—Indicate the probability of occurrence of geological hazards in the area, such as earthquakes, slumping, landslides, subsidence, permafrost, and erosion.

2.2 *Species and ecosystems.*—Identify those species and ecosystems that will be affected by the proposed action.

2.2.1 *Species.*—List in general categories, by common and scientific names, the plant and wildlife species found in the area of the proposed action and indicate those having commercial and recreational importance.

2.2.2 *Communities and associations.*—Describe the dominant plant and wildlife communities and associations located within the area of the proposed action. Provide an estimate of the population densities of major species. If data are not available for the immediate area of the proposed action, data from comparable areas may be used.

2.2.3 *Unique and other biotic resources.*—Describe unique ecosystems or communities, rare or endangered species, and other biotic resources that may have special importance in the area of the proposed action. Describe any areas of critical environmental concern, e.g., wetlands and estuaries. Summarize findings of any studies conducted thereon.

2.3 *Socioeconomic considerations.*—If the proposed action could have a significant socioeconomic effect on the local area, discuss the socioeconomic future, including population and industrial growth, of the area without the implementation of the proposed action; describe the economic development in the vicinity of the proposed action, particularly the local tax base and per capita income; and identify trends in economic development and/or land use of the area, both from a historical and prospective viewpoint. Describe the population densities of both the immediate and generalized area. Include distances from the site of the proposed action to nearby residences, cities, and urban

areas and list their populations. Indicate the number and type of residences, farms, businesses, and industries that will be directly affected and those requiring relocation if the proposed action occurs.

2.4 Air and water environments.—Describe the prevailing climate and the quality of the air (including noise) and water environments of the area. Estimate the quality and availability of surface water resources in the proposed project area.

2.4.1 Climate.—Describe the historic climatic conditions that prevail in the vicinity of the proposed action; extremes and means of monthly temperatures, precipitation, and wind speed and direction. In addition, indicate the frequency of temperature inversions, fog, smog, icing, and destructive storms such as hurricanes and tornadoes.

2.4.2 Hydrology and hydrography.—Describe surface waters, fresh, brackish, or saline, in the vicinity of the proposed action and discuss drainage basins, physical and chemical characteristics, water use, water supplies, and circulation. Describe the ground water situation, water uses and sources, aquifer systems, and flow characteristics.

2.4.3 Air, noise, and water quality monitoring.—Provide data on the existing quality of the air and water, indicate the distance(s) from the proposed action site to monitoring stations and the mean and maximum audible noise and radio interference levels at the site boundaries.

2.5 Unique features.—Describe unique or unusual features of the area, including historical, archeological, and scenic sites and values.

3. *Environmental impact of the proposed action.*—Describe all known or expected significant environmental effects and changes, both beneficial and adverse, which will take place should the action be carried out. Include the impacts caused by (a) construction, (b) operation, including maintenance, breakdown, and malfunctions, and (c) termination of activities, including abandonment. Include both direct and primary indirect changes in the existing environment in the immediate area and throughout the sphere of influence of the proposed action.¹

3.1 *Construction.*

3.1.1 *Land features and uses.*—Assess the impact on present or future land use, including commercial use, mineral resources, recreational areas, public health and safety, and the aesthetic value of the land and its features. Describe any temporary restriction on land use due to construction activities. State the effect of construction related activities upon local traffic patterns, including roads, highways, ship channels, and aviation patterns.

3.1.2 *Species and ecosystems.*—Assess the impact of construction on the terrestrial and aquatic species and habitats in the area, including clearing, excavation, and

¹ *Changes in the Environment Throughout the Sphere of Influence of Proposed Action.*—Direct and indirect effects are those effects which can be discerned as occurring primarily because the proposed action would occur. For example: (1) The impact of a borrow pit would be evaluated to the extent that it would be developed or expanded but the manufacture of conventional trucks to work the pit would not; (2) the impact of construction workers moving into the area would be evaluated but not the impact of their leaving present homes. However, the impact of their subsequent leaving this place must be considered.

impoundment. Discuss the possibility of a major alteration to the ecosystem and any potential loss of an endangered species.

3.1.3 *Socioeconomic considerations.*--Discuss the effect on local socioeconomic development in relation to labor, housing, local industry, and public services. Discuss the need for relocations of families and businesses. Describe the beneficial effects, both direct and indirect, of the action on the human environment, such as benefits resulting from the services and products, and other results of the action (include tax benefits to local and State governments, growth in local tax base from new business and housing development and payrolls). Describe the impact on human elements, including the need for increased public services (schools, health facilities, police and fire protection, housing, waste disposal, markets, transportation, communication, energy supplies, and recreational facilities and uses in the proposed project area, including any changes which will occur in recreational use and potential of the local area or region) due to the proposed action; provisions for public access to and use of project lands and waters, including the impacts these uses will have on the area; project lands reserved for future recreation development and the types of facilities which will be or which may need to be provided thereon and how the incremental uses of these lands will affect the area, including the effects of any increased recreational use on the land and water resources and on the public service facilities which presently exist or which would need to be developed to provide for public needs. Discuss the impact of the proposed action on national and local historic and archeological sites, any existing scenic, and cultural values.

3.1.4 *Air and water environment.*—Estimate the qualitative and quantitative effects on air, noise, and water quality, including sedimentation, and whether regulatory standards in effect for the area will be complied with.

3.1.5 *Waste Disposal.*—Discuss the impact of disposal of all waste material such as spoils, vegetation, and construction materials.

3.2 *Operation and maintenance.*

3.2.1 *Land features and uses.*—Outline restrictions on existing and potential land use in the vicinity of the proposed action, including mineral and water resources. State the effect of operation related activities upon local traffic patterns including roads, highways, ship channels, and aviation patterns, and the possible need of new facilities.

3.2.2 *Species and ecosystems.*—Assess the impact of operation upon terrestrial and aquatic species and habitats, including the importance of plant and animal species having economic or aesthetic value to man that would be affected by the action; provide pertinent information on animal migrations, foods, and reproduction in relation to the impacts; and describe any ecosystem imbalances that would be caused by the action and the possibility of major alteration to an ecosystem or the loss of an endangered species. Assess any effects of this action which would be cumulative to those of other similar, existing projects or proposed actions.

3.2.3 *Socioeconomic considerations.*—Discuss the effect on the local socioeconomic development in relation to labor, housing and population growth trends, relocation, local industry and industrial growth, and

public service. Describe the beneficial effects, both direct and indirect, of the action on the human environment such as economic benefits resulting from the services and products, energy, and other results of the action (include tax benefits to local and State governments, growth in local tax base from new business and housing developments, and payrolls). Describe impacts on human elements, including any need for increased public service (schools, police and fire protection, housing, waste disposal, markets, transportation, communication and recreational facilities). Indicate the extent to which maintenance of the area is dependent upon new sources of energy or the use of such vital resources as water.

3.2.4 *Air and water environment.*—Assess the impact on present air quality. Assess the impact on present noise levels due to project-related noises. Assess the impact on present water quality, including sedimentation, due to reservoir operations, downstream water releases, power peaking operations, location of outlet works, and sanitary, waste, and process effluents.

3.2.5 *Solid wastes.*—Describe any impacts from accumulation of solid wastes and by-products that will be produced.

3.2.6 *Use of resources.*—Quantify the resources necessary for operational uses; e.g., water (human needs and processes, energy requirements, raw products, and specialized needs. Assess the impact of obtaining and using these resources.

3.2.7 *Maintenance.*—Discuss the impact of maintenance programs, such as subsequent clearing or treatment of rights-of-way. Discuss the potential impact of major breakdowns and shutdowns of the facilities and how service will be maintained during shutdowns.

3.2.8 *Accidents and catastrophes.*—Describe any impacts resulting from accidents and natural catastrophes, which might occur, and provide an analysis of the capability of the area to absorb predicted impacts.

3.3 *Termination and abandonment.*—Discuss the impact on land use and aesthetics of the termination and/or abandonment of facilities resulting from the proposed action.

4. *Measures to enhance the environment or to avoid or mitigate adverse environmental effects.*—Identify all measures which will be undertaken to enhance the environment or eliminate, avoid, mitigate, protect, or compensate for adverse and detrimental aspects of the proposed action, as described under part 3 above, including engineering planning and design, design criteria, contract specifications, selection of materials, construction techniques, monitoring programs during construction and operation, environmental tradeoffs, research and development, and restoration measures which will be taken routinely or as the need arises.

4.1 *Preventative measures and monitoring.*—Discuss provisions for pre-and post-monitoring of significant environmental impacts of the proposed action. Include programs for monitoring changes in operational phases. Describe proposed measures for detecting and modifying noise levels, monitoring air and water quality, inventorying key species in food chains, and detecting induced changes in the weather. Describe measures, including equipment, training procedures, and vector² control measures, to be taken for protecting the health and welfare of workers and the public at the project during its construction, operation, and maintenance, including structures to exclude people from hazardous

² Carriers (e.g., ticks, mosquitoes, and rodents) of diseases.

areas or to protect them during changes in operations; include sanitary and solid and liquid waste disposal facilities for workers and the public during construction and operation. Discuss measures to be undertaken to minimize problems arising from malfunctions and accidents (with estimates of probability of occurrence). Identify standard procedures for protecting services and environmental values during maintenance and breakdowns. Discuss proposed and alternative construction timetables to prevent significant environmental impacts and plans for implementation of changes whenever necessary to reduce environmental impact.

4.2 *Environmental restoration and enhancement.*—Discuss all measures to be taken to restore and enhance the environment, including measures for restoration, replacement, or protection of flora and fauna and of scenic, historic, archeological, and other natural values, describe measures to facilitate animal migrations and movements to protect their life processes (e.g., spawning and rearing of fish); describe programs for landscaping and horticultural practices; describe selection and use of any chemicals needed during construction operation, and maintenance so as to prevent their entry into waters in the area; discuss programs to assist displaced families and businesses in their relocation; describe provisions for public access to, and use of, lands and waters in the area of the proposed action; and discuss the preparation of lands prior to and following their use.

5. *Unavoidable adverse environmental effects.*—Discuss all significant environmental effects which cannot be avoided by measures outlined in section 4 above.

5.1 *Human resources impacted.*—Indicate those human resources and values which will sustain significant, unavoidable adverse effects and discuss whether the impact will be transitory, a one-time but lasting effect, repetitive, continual, incremental, or synergistic to other effects and whether secondary adverse consequences will follow. Focus on the displacement of people by the proposed action and its local economic, and aesthetic implications; on human health and safety; and on aesthetic and cultural values and standards of living which will be sacrificed or endangered. Where possible provide quantitative evaluations of these effects.

5.2 *Uses preempted and unavoidable changes.*—Discuss all significant, unavoidable environmental impacts on the land and its present use, caused by inundation, clearing, excavation, and fills; losses to wildlife habitat, forests, unique ecosystems, minerals, and farmlands; effects on fish habitat and migrations; on relocation of populations and manmade facilities, such as homes, roads, highways, and trails; on historical, recreational, archeological, and aesthetic values or scenic areas.

5.3 *Loss of environmental quality.*—Discuss any significant, unavoidable adverse changes in the air, including dust and emissions to the air, and noise levels; impacts resulting from solid wastes and their disposal; effects on the water resources of the area, including consumptive uses.

6. *Relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity.*—Compare the benefits to be derived from the immediate or short-term use of the environment, with and without the proposed action, and

the long-term consequences of the proposed action.³ Actions which diminish the diversity of beneficial uses of the environment or preempt the options for future uses or needs require detailed analysis, to assure that shortsighted decisions are not made which may commit future generations to undesirable courses of actions.

6.1 *Short-term uses.*—Assess the local short-term uses of man's environment in terms of the proposed action's benefit to man, land use, alterations to the ecosystem, use of resources, and public health and safety.

6.2 *Long-term productivity.*—Discuss any cumulative long-term effects which may be caused by the proposed action in terms of land use, alterations to the ecosystem, use of resources and public health and safety.

7. *Irreversible and irretrievable commitments of resources.*—Discuss, and quantify when possible, any irrevocable commitments of resources which would be involved in the implementation of the proposed action.

7.1 *Land features and uses.*—Discuss any permanent changes in land features and/or land use.

7.2 *Endangered species and ecosystems.*—Assess the possibility of eliminating any endangered species or the loss or alteration of an ecosystem.

7.3 *Socioeconomic consideration.*—Discuss probable indirect actions (e.g., new highway system or waste water treatment facilities, housing developments, etc.) made economically feasible by the implementation of the

³ *Duration of Impacts*—Short-term impacts and benefits generally are those which occur during the development and operation of a project. Long-term productivity related to an effect that remains many years (sometimes permanently) after the cause. As examples, strip mining without restoration and land inundation by reservoirs have obvious long-term effects.

proposed action that would likely be triggered and would irrevocably commit other resources under our free enterprise system. Identify the destruction of any historical, archeological, or scenic areas.

7.4 *Resources lost or uses preempted.*—Analyzed the extent to which the proposed action would curtail the range of beneficial uses of the environment. Determine whether, considering presently known technology, the proposed use of resources or any resource extraction method would contaminate other associated resources or foreclose their usage.

7.5 *Finite resources.*—Indicate the irreversible and/or irretrievable resources that would be committed as a result of the proposed action, such as fossil fuels, and construction materials.

8. *Alternatives to the proposed action.*—Discuss the systematic procedure used to arrive at the proposed action, starting with the broadest, feasible objectives of the action and progressively narrowing the alternatives to a specific action at a specific site or right-of-way. This systematic procedure should include the decision criteria used, the information weighed, and an explanation of the conclusion at each decision point. The decision criteria must show how environmental benefits/costs, even if not quantifiable, are weighed against economic benefits/costs and technology and procedural constraints. All realistic alternatives must be discussed even though they may not be within the jurisdiction of the Commission or the responsibilities and capabilities of the applicant. Modification of the proposed action may be among the alternatives. Describe the timeliness and the environmental consequences of each alternative discussed.

8.1 *Objective.*—Explain the need for any proposed new energy supply.

8.2 *Energy alternatives.*—Discuss the potential for accomplishing the proposed objectives through energy conservation and the potential for using realistic energy alternatives, such as natural and artificial gas, oil, and coal. Also discuss realistic electric energy alternatives, such as gas, oil, coal, and nuclear-fueled power plants, and other conventional and pumped storage hydroelectric plans. Provide an analysis of environmental benefits and costs.

8.3 *Sites and locations.*—Discuss considerations given to alternative sites and locations. Include a description of each site, a summary of environmental factors of each site, the reasons for rejection, and an analysis of environmental benefits and costs.

8.4 *Designs, processes, and operations.*—Describe alternative facility designs, processes (e.g., handling of waste water and solid wastes), and/or operations that were considered and discuss the environmental consequences of each, the reasons for rejection, and an analysis of environmental benefits and costs.

8.5 *No action.*—Discuss the alternative of no action with an evaluation of the consequences of this option on a national, regional, State, or local level, as appropriate. Present a brief perspective of what future use the proposed site (area) may assume if the proposed facilities are not constructed and summarize the environmental benefits and costs.

9. *Permits and compliance with other regulations and codes.*

9.1 *Permits.*—Identify all necessary Federal, regional, State and local permits, licenses, and certificates needed before the proposed action can be completed, such as permits needed from State and local agencies for construction and waste discharges. Describe steps which have been taken to secure these permits and any additional efforts still required.

9.1.1 *Authorities consulted.*—List all authorities consulted for obtaining permits, licenses, and certificates, including zoning approvals needed to comply with applicable statutes and regulations.

9.1.2 *Dates of approval.*—Give dates of consultations and of any approvals received.

9.2 *Compliance with health and safety regulations and codes.*—Identify all Federal, regional, State, and local safety and health regulations and codes which must be complied with in the construction, maintenance, and operation of the proposed project. Also identify other health and safety standards and codes that will be complied with, such as underwriter codes and voluntary industry codes.

9.2.1 *Authorities consulted.*—List all authorities and professional organizations consulted in identifying pertinent regulations and codes.

9.2.2 *Procedures to be followed.*—Describe any specific procedures or actions that will be taken to assure compliance with each such regulation and code.

9.3 *Compliance with other regulations and codes.*—Identify all other Federal, regional, State and local regulations and codes which must be complied with in the construction, maintenance, and operation of the proposed project.

9.3.1 *Authorities consulted.*—List all authorities and professional organizations consulted in identifying pertinent regulations and codes.

9.3.2 *Procedures to be followed.*—Explained the specific procedures or actions that will be taken to assure compliance with each such regulation and code.

10. *Source of information.*

10.2 *Public hearings.*—Describe any public hearing or meetings held, summarize the general tenor of public comments with the proportions of proponents to those in dissent, and include any public records resulting from these meetings. Include a description of the manner in which the public was informed of the time and place of the hearings. Fully discuss efforts made for seeking constructive inputs from affected people and how their concerns were accommodated.

10.2 *Other sources.*—Identify all other sources of information utilized in the preparation of the environmental report, including:

10.2.1 *Meetings with governmental and other entities.*—List meetings held with Federal, regional, State, and local planning, commerce, regulatory, environmental and conservation entities, the subjects discussed (e.g., recreation, fish, wildlife, aesthetics, other natural resources, and values of the area, and economic development), and any environmental conclusions reached as a result of the meeting.

10.2.2 *Studies conducted.*—Identify the studies conducted, including those by consultants, the general nature and major findings of those studies, and the title and availability of any reports thereon.

10.2.3 *Consultants*.—Give the names, addresses, and professional vitae of all consultants who contributed to the environmental report.

10.2.4 *Bibliography*.—Provide a bibliography of the books, other publications, reports, documents, maps, and aerial photographs consulted for background information, including county land use and other planning reports. Indicate by some method, as by asterisks or numbers, those bibliographic references specifically cited in the environmental report.

10.3 *Provide copies of supporting reports*.—Supply at least a single copy of all technical reports prepared in conjunction with the preparation of the environmental report, such as model, heat budget, plankton, fish, and benthic sampling studies.

[Order 407, 35 FR 11389, July 16, 1970]

[Order 415-C, 38 FR 15949, June 19, 1973. Redesignated by Order 486, 52 FR 47910, Dec. 17, 1987, and amended by Order 486, 52 FR 47914, Dec. 17, 1987]z

JUN 4 1990

SPANIOL, J.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PUBLIC SERVICE COMMISSION OF THE STATE OF
NEW YORK, PETER A. BRADFORD, HAROLD A.
JERRY, JR., GAIL GARFIELD SCHWARTZ, ELI M.
NOAM, JAMES T. McFARLAND, EDWARD M.
KRESKY and HENRY G. WILLIAMS, in their official
capacity as Commissioners of the Public Service Commission
of the State of New York,

Petitioners,

vs.

NATIONAL FUEL GAS SUPPLY CORPORATION,

Respondent.

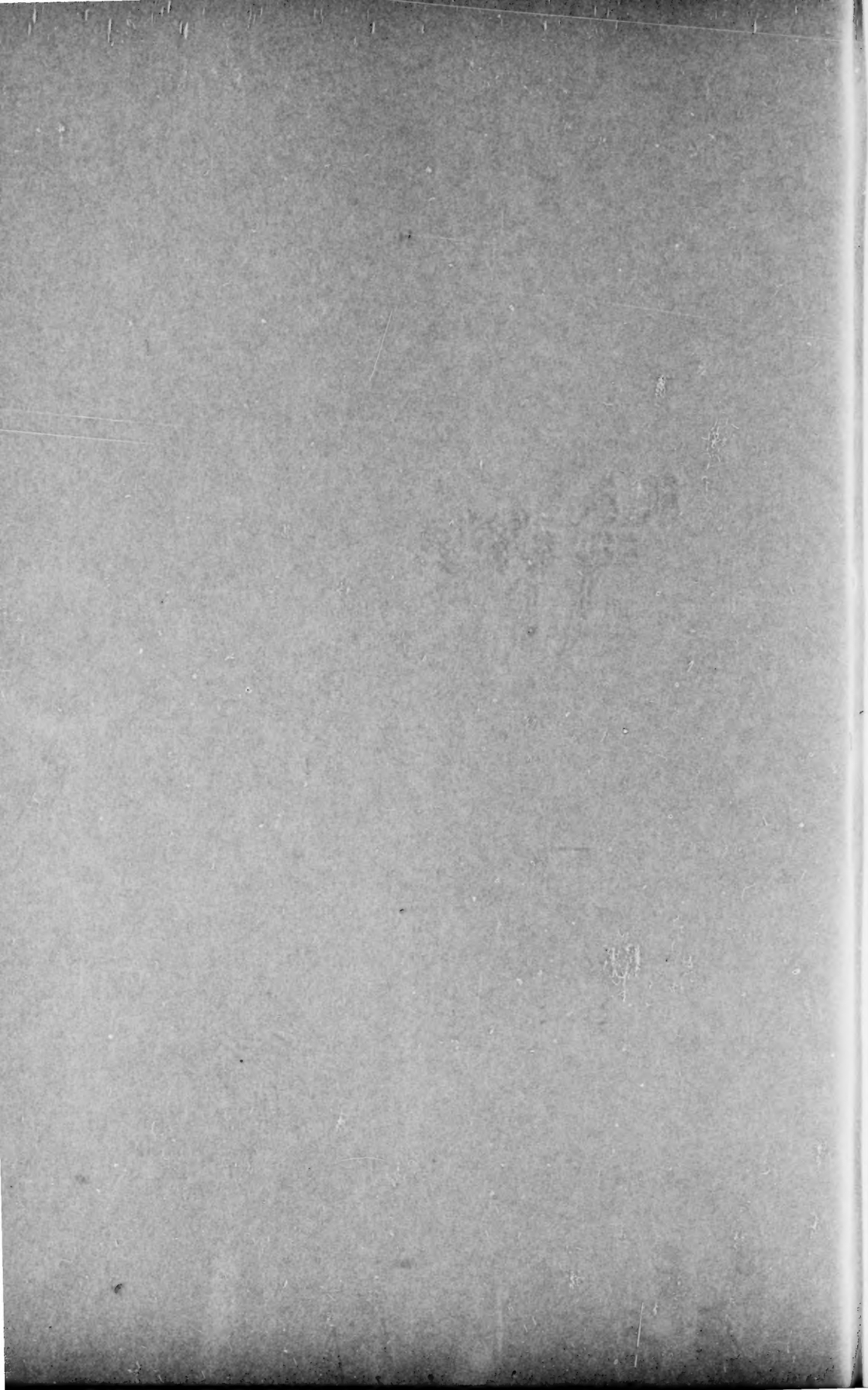
ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Federal Energy Regulatory Commission's exclusive jurisdiction to regulate facilities used to transport natural gas in interstate commerce preempt New York Public Service Commission efforts to regulate the same facilities?

STATEMENT PURSUANT TO RULE 29.1

Respondent National Fuel Gas Supply Corporation is a wholly owned subsidiary of National Fuel Gas Company. National Fuel Gas Company also wholly owns National Fuel Gas Distribution Corporation, Penn-York Energy Corporation, Seneca Resources Corporation, Empire Exploration, Inc., Utility Constructors, Inc., Highland Land & Minerals, Inc., Enerop Corporation, and Data-Track Account Services, Inc.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989
No. 89-1749

PUBLIC SERVICE COMMISSION OF THE STATE OF
NEW YORK, PETER A. BRADFORD, HAROLD A.
JERRY, JR., GAIL GARFIELD SCHWARTZ, ELI M.
NOAM, JAMES T. McFARLAND, EDWARD M. KRESKY
and HENRY G. WILLIAMS, in their official capacity as
Commissioners of the Public Service Commission of the State
of New York,

Petitioners,

vs.

NATIONAL FUEL GAS SUPPLY CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

National Fuel Gas Supply Corporation ("National Fuel") instituted this action for a declaratory judgment because the Public Service Commission of the State of New York (the "PSC") seeks to regulate National Fuel's natural gas pipeline facilities that are used and to be used exclusively for the interstate transportation and sale for resale of natural gas in interstate

commerce. Since such facilities are regulated exclusively by federal law pursuant to the Natural Gas Act, 15 U.S.C. § 717 *et seq.* (1976 & Supp. 1990), and the Natural Gas Pipeline Safety Act, 49 U.S.C. § 1671 *et seq.* (1983 & Supp. 1990), National Fuel contends that the PSC's attempt to regulate those facilities violates the Supremacy Clause of the United States Constitution, article VI, clause 2, and is preempted.

A. Federal Regulation of Pipeline Facilities Used To Transport Natural Gas In Interstate Commerce.

In the Natural Gas Act, Congress declared that "the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." 15 U.S.C. § 717(a).¹ Congress drew a precise line between those matters regulated by the Natural Gas Act and those to which the Natural Gas Act does not apply, stating that the Natural Gas Act:

shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, *but shall not apply* to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

15 U.S.C. § 717(b) (emphasis added). Congress conferred comprehensive authority to implement and administer the Natural Gas Act on the Federal Energy Regulatory Commission

¹ The relevant portions of the Natural Gas Act, 15 U.S.C. §§ 717, 717a, 717f, and 717o, are reproduced as Appendix F to the Petition For A Writ Of Certiorari ("Petition"), pp. 64a - 71a.

("FERC") (formerly the Federal Power Commission). 15 U.S.C. § 717o. The Natural Gas Act and the Natural Gas Pipeline Safety Act, 49 U.S.C. §§ 1671-1684, form a comprehensive national regulatory policy for natural gas transported or sold in interstate commerce.

Pursuant to section 7(c) of the Natural Gas Act, 15 U.S.C. § 717f(c), a "natural-gas company" must obtain a "certificate of public convenience and necessity" from FERC before constructing, expanding, acquiring or operating any facilities involved in the transportation or sale of natural gas in interstate commerce. Pursuant to section 7(b) of the Natural Gas Act, 15 U.S.C. § 717f(b), no "natural-gas company" may abandon any portion of its facilities involved in the transportation or sale of natural gas in interstate commerce without first obtaining the permission and approval of FERC.

Under its regulatory authority, FERC has promulgated extensive regulations entitled "Applications for Certificates of Public Convenience and Necessity and for Orders Permitting and Approving Abandonment Under Section 7 of the Natural Gas Act, as Amended, Concerning Any Operation, Sales, Service, Construction, Extension, Acquisition or Abandonment." 18 C.F.R. Part 157, Subpart A (1989).² Those regulations require that applicants for a certificate of public convenience and necessity submit "all pertinent data and information necessary for a full and complete understanding of the proposed project..." 18 C.F.R. § 157.5(a).

Applicants for a certificate of public convenience and necessity are required to attach numerous exhibits setting forth extensive information to their applications. 18 C.F.R. § 157.14. Applications to abandon facilities require additional submissions. 18 C.F.R. § 157.18. Each exhibit must "provide a full and complete explanation of the data submitted, the manner in which it was obtained, and the reasons for the conclusions which are derived"

² 18 C.F.R. Part 157, Subpart A, §§ 157.5-157.21, is reproduced in Appendix G to the Petition, pp. 79a - 120a.

therefrom. 18 C.F.R. §§ 157.14(a) and 157.18. The required exhibits include, *inter alia*, a geographical map showing the subject facilities and their size; flow diagrams showing operations with and without the subject facilities; a detailed estimate of the total capital cost of the subject facilities and plans for financing those costs; and a statement setting forth the arrangements in place for constructing, operating, and managing the facilities. 18 C.F.R. § 157.14(a).

The exhibits must also include a statement of the factors considered in locating the facilities, including the possibility of using existing rights-of-way (18 C.F.R. § 157.14(a)(6-a)); a statement of the factors considered in locating facilities in scenic, historic, recreational or wildlife areas and the reasons for such location (18 C.F.R. § 157.14(a)(6-b)); a statement that the applicant has adopted the guidelines for planning, locating, constructing and maintaining facilities contained in 18 C.F.R. § 2.69, which provides that “[i]n the interest of preserving scenic, historic, wildlife and recreational values, construction and maintenance of facilities authorized by certificates granted under section 7(c) of the Natural Gas Act should be undertaken in a manner that will minimize adverse effects on these values” (18 C.F.R. § 157.14(a)(6-c)); and a statement concerning the environmental impact of the proposed project in compliance with the requirements of the National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.* (1983 & Supp. 1989) (18 C.F.R. §§ 157.1-4(a)(6-d) and 380.3). Where other federal, regional, state or local permits, licenses or certificates are to be obtained before the proposed action can be completed, they are to be identified. 18 C.F.R. § 380, App. A ¶ 9.1 (“such as permits needed . . . for construction and waste discharges”).

Notice of each application to FERC for a certificate of public convenience and necessity under section 7 of the Natural Gas Act must be published in the Federal Register and mailed to the states affected by the proposed project. 18 C.F.R. § 157.9. That notice fixes the time within which persons desiring to participate in the proceeding, including any interested state commission, must file a petition or notice of intervention. 18 C.F.R.

§ 157.10. Upon the filing of a timely notice of intervention, a state commission becomes a party to the proceeding as of right. 18 C.F.R. § 385.214.

Before issuing a certificate to a qualified applicant, FERC must find that "the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity..." 15 U.S.C. § 717f(e).

B. Article VII of the Public Service Law of the State of New York.

Article VII of the Public Service Law of the State of New York, §§ 120-130 (McKinney 1989),³ titled "Siting of Major Utility Transmission Facilities," requires persons who seek to construct major utility transmission facilities in New York State, including natural gas transmission lines extending a distance of one thousand feet or more to be used to transport natural gas at pressures of one hundred twenty-five pounds per square inch or more, to obtain first a certificate of environmental compatibility and public need from the Public Service Commission of the State of New York. N.Y. Pub. Serv. Law § 121.

Before issuing a certificate of environmental compatibility and public need for a natural gas transmission line, the PSC must find and determine:

- (a) the basis of the need for the facility;
- (b) the nature of the probable environmental impact;

³ Article VII of the Public Service Law of the State of New York is reproduced as Appendix E to the Petition, pp. 48a - 63a.

(c) that the facility represents the minimum adverse environmental impact, considering the state of available technology and the nature and economics of the various alternatives, and other pertinent considerations including but not limited to, the effect on agricultural lands, wetlands, parklands, and river corridors traversed; . . .

(e) . . . that the location of the line will not pose an undue hazard to persons or property along the area traversed by the line;

(f) that the location of the facility as proposed conforms to applicable state and local laws and regulations issued thereunder. . . ; [and]

(g) that the facility will serve the public interest, convenience and necessity. . . .

N.Y. Pub. Serv. Law § 126 subd. 1. For natural gas transmission lines extending a distance of less than ten miles, the PSC need make only the determinations required by paragraphs (a), (b), (e), (f) and (g) of Public Service Law § 126 subd. 1. N.Y. Pub. Serv. Law § 121-a subd. 7.

By its terms, Article VII is not applicable to major utility transmission facilities “[o]ver which any agency or department of the federal government has exclusive jurisdiction. . . .” N.Y. Pub. Serv. Law § 121 subd. 4.c. Although Article VII was added to the Public Service Law in 1970, it is only in the last few years that the PSC has sought to subject pipelines used to transport natural gas in interstate commerce to its requirements.

C. National Fuel’s West Seneca Pipeline Project and the FERC Proceedings Thereon.

As a company engaged in the transportation of natural gas in interstate commerce and the sale in interstate commerce of natural gas for resale for ultimate public consumption, National Fuel is a “natural-gas company” subject to regulation by FERC under the Natural Gas Act. 15 U.S.C. § 717a(6).

On January 27, 1986, National Fuel filed an application with FERC, Docket No. CP86-292-000, pursuant to sections 7(b) and 7(c) of the Natural Gas Act, for permission and approval to abandon 1.78 miles of 20-inch bare steel pipeline and a regulator station and for a certificate of public convenience and necessity authorizing the construction and operation of 1.61 miles of 20-inch coated steel pipeline and a regulator station to replace those abandoned, all located in the town of West Seneca, Erie County, New York. Natural gas is transported, directly and indirectly, through National Fuel's pipeline to distribution companies for resale in the States of Ohio, Pennsylvania, New York, New Jersey and Massachusetts. The facilities to be abandoned are used solely for transporting natural gas in interstate commerce; the replacement facilities will be used solely for transporting natural gas in interstate commerce.

As required by FERC regulations, National Fuel's application for a certificate of public convenience and necessity included a topographic map showing the precise location of the proposed pipeline, a statement of the factors considered in locating the facility in scenic, historical, recreational, or wildlife areas and an environmental report that discussed the water use and quality in each stream to be crossed, vegetation and wildlife, cultural resources, geological hazards and resources, soil resources, the uses of the land to be traversed, and alternatives to the proposed route. The environmental report also provided a sketch of the construction methods to be used to cross surface waters, a description of the source and discharge of waters to be used for hydrostatic testing of the new pipeline, and an erosion control and revegetation plan. In the environmental report, National Fuel stated its intention to procure stream and road crossing permits from the New York State Department of Environmental Conservation, the Erie County Department of Public Works and the New York State Department of Transportation.

On February 20, 1986, FERC issued notice of National Fuel's application. Notice was published in the Federal Register on February 26, 1986 (51 Fed. Reg. 6796). The PSC elected not to

file a notice of intervention to become a party to National Fuel's application proceeding.

FERC issued an Order Authorizing Abandonment and Issuing Certificate on June 16, 1986.⁴ In that Order, FERC found that the facilities involved are used or will be used in the transportation of natural gas in interstate commerce subject to its jurisdiction. Petition Appendix C, p. 38a. FERC issued a certificate of public convenience and necessity "authorizing National Fuel to construct and operate the subject facilities and to deliver gas at the new delivery point." *Id.*, p. 39a.

On October 19, 1987, National Fuel filed a petition with FERC, Docket No. CP86-292-001, to amend FERC's June 16, 1986 Order. National Fuel sought a certificate of public convenience and necessity to install 1.45 miles of 20-inch coated steel pipe on a revised route. National Fuel revised the environmental report, cost of facilities statement, and topographic map submitted with its 1986 application.⁵

FERC issued notice of National Fuel's petition to amend on October 28, 1987. Notice was published in the Federal Register on November 4, 1987 (52 Red. Reg. 42337). Once again, the PSC elected not to become a party to National Fuel's proceeding.

FERC issued an Order Amending Certificate on July 5, 1988 that approved the revised route.⁶ In that Order, FERC amended the previous certificate of public convenience and necessity "so as to authorize the construction and operation of replacement pipeline along a modified route." Petition Appendix C, p. 41a.

⁴ FERC's June 16, 1986 Order is reproduced in Appendix C to the Petition, pp. 37a - 39a.

⁵ National Fuel's supplemental environmental report illustrates the specificity of FERC review of pipeline siting. Attached to that report was a survey drawing showing that, with the property owner's consent, the revised pipeline route would pass 22.5 feet from the corner of a residence and 15 feet from the property line.

⁶ FERC's July 5, 1988 Order is reproduced in Appendix C to the Petition, pp. 40a - 42a.

National Fuel had previously obtained road crossing permits from the Erie County Department of Public Works, Division of Highways, and the New York State Department of Transportation and a stream crossing permit from the New York State Department of Environmental Conservation for the new pipeline route, but those permits had lapsed. Thus, FERC noted that "National Fuel will also have to file for a renewal of its stream crossing and road crossing permits with the appropriate authorities." *Id.*

D. The Proceedings and Decision Below.

The present PSC contends that it has Article VII jurisdiction over *all* natural gas pipelines in New York State longer than one thousand feet used to transmit gas at pressures of one hundred twenty-five pounds per square inch or more, including pipelines used to transport natural gas in interstate commerce. Thus, despite National Fuel's certificate of public convenience and necessity from FERC authorizing the West Seneca pipeline replacement project and National Fuel's compliance with the terms of that certificate, the PSC threatens to fine National Fuel up to \$100,000 per day if National Fuel does not comply with Article VII before beginning that project.⁷

⁷ The PSC asserts that National Fuel began this action "[r]ather than obtain stream and road crossing permits from the PSC." Petition, p. 7. This assertion is erroneous to the extent that it implies that National Fuel did not obtain the stream and road crossing permits contemplated by the FERC certificates and thus failed to comply with those certificates. National Fuel fully complied with the FERC certificates by obtaining the contemplated permits from the apposite New York agencies. It was the PSC's insistence that National Fuel submit to its Article VII jurisdiction, although National Fuel had obtained permits from these other state and local agencies, that forced National Fuel to bring this action.

At certain points, the PSC suggests that National Fuel has not complied with the provisions in the FERC certificate with regard to state and local permits. As Judge Winter explained, however, "[t]o the extent that the PSC desires to challenge National Fuel's compliance with the FERC order, it may pursue whatever federal administrative and judicial remedies are available to compel that compliance." Petition Appendix A, p. 18a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d 571, 579 (2d Cir. 1990). In any such proceeding, National Fuel would expect to show that it had complied fully with FERC's requirements.

On November 9, 1988, National Fuel instituted this action in the United States District Court for the Northern District of New York for judgment declaring that Article VII is preempted by federal law and federal regulation with respect to natural gas pipeline facilities used exclusively to transport natural gas in interstate commerce and enjoining the PSC from requiring National Fuel to comply with Article VII before constructing such facilities.

After the PSC answered National Fuel's complaint, National Fuel and the PSC filed cross-motions for summary judgment. In a decision delivered after argument on April 7, 1989, Judge Howard G. Munson denied National Fuel's motion, granted the PSC's motion and dismissed National Fuel's complaint.⁸

National Fuel filed a timely Notice of Appeal with the United States Court of Appeals for the Second Circuit on May 4, 1989. On January 24, 1990, the Second Circuit reversed the District Court decision in an opinion written by Judge Winter.⁹ Relying on this Court's decision in *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293 (1988), the Second Circuit held that, in the Natural Gas Act, Congress vested FERC with exclusive authority over the rates *and facilities* of interstate gas pipelines. Petition Appendix A, pp. 11a - 12a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 576. In response to the PSC's assertion that it intended to limit its Article VII jurisdiction to site-specific environmental review, the Second Circuit stated that PSC "review is undeniably a regulation of a facility used in the interstate transportation of natural gas. Such proceedings would certainly delay and might well, by the imposition of additional requirements or prohibitions, prevent the construction of federally approved interstate gas facilities." Petition Appendix A,

⁸ The transcript of Judge Munson's April 7, 1989 decision is reproduced in Appendix B to the Petition, pp. 27a - 36a.

⁹ The Second Circuit opinion is reproduced in Appendix A to the Petition, pp. 1a - 18a, and is reported at *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d 571 (1990).

p. 12a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 576-77 (footnote omitted). The Second Circuit further held that a comparison of Article VII and the FERC regime reveals such substantial overlap that preemption would have to be inferred from Congress's complete occupation of the field that the PSC would regulate. Petition Appendix A, pp. 12a - 13a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 577.

On March 14, 1990, the Second Circuit denied a PSC motion for rehearing. On April 27, 1990, the Second Circuit denied a PSC motion for clarification, but granted the PSC a stay of the Second Circuit mandate on the condition that the PSC file its petition for certiorari within fourteen days.

SUMMARY OF ARGUMENT

There are no special and important reasons for this Court to review this case on writ of certiorari. The decision of the United States Court of Appeals for the Second Circuit is wholly consistent with this Court's numerous decisions holding that, under the Natural Gas Act, FERC has exclusive and comprehensive jurisdiction over interstate natural gas transmission facilities. All regulation of such facilities by the states is preempted; environmental review is no exception.

The Second Circuit correctly held that Article VII may not be employed to regulate interstate natural gas transmission facilities. Congress has so completely occupied the field of regulation of interstate natural gas transmission facilities that the PSC cannot apply Article VII to such facilities without the imminent possibility of conflict with the FERC regime, thus offending the Supremacy Clause.

REASONS FOR DENYING THE WRIT

I. THE SECOND CIRCUIT'S HOLDING THAT FERC REGULATION OF NATURAL GAS PIPELINES USED IN INTERSTATE COMMERCE IS COMPREHENSIVE AND PREEMPTS ANY STATE REGULATION OF THE SAME FACILITIES FOLLOWS THE DECISIONS OF THIS COURT.

The Second Circuit simply followed this Court's decision in *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293 (1988), which held that under the Natural Gas Act, FERC has exclusive authority over the "rates and facilities" of interstate gas pipelines. See 485 U.S. at 300-01, 306 (emphasis added). Moreover, *Schneidewind* does not stand alone. Numerous decisions of this Court interpreting section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b), establish two principles. First, in section 1(b), "Congress meant to draw a bright line easily ascertained, between state and federal jurisdiction, making unnecessary . . . case-by-case analysis." *FPC v. Southern Cal. Edison Co.*, 376 U.S. 205, 215-16 (1964). Second, for matters on the federal side of the bright line drawn by section 1(b), FERC jurisdiction is exclusive and comprehensive.¹⁰

The NGA long has been recognized as a "comprehensive scheme of federal regulation of 'all wholesales of natural gas in interstate commerce.'" *Northern Natural Gas Co. v. State Corporation Comm'n of Kansas*, 372 U.S. 84, 91 (1963), quoting *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 682

¹⁰ The PSC's reliance on *Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas*, 489 U.S. 493, 109 S. Ct. 1262 (1989) in support of its contention that Congress did not intend to occupy the entire natural gas field (Petition, p. 12) is misplaced and ignores the bright line drawn by the Natural Gas Act. The Kansas Commission's order in that case regulated "production rates in order to protect producers' correlative rights — a matter firmly on the States' side of that dividing line [in Section 1(b) of the Natural Gas Act]." 109 S. Ct. at 1276. Since the Kansas order "regulates in a field that Congress expressly left to the States; it does not conflict with the federal regulatory scheme; hence it is not pre-empted." 109 S. Ct. at 1273.

(1954). The NGA confers upon FERC exclusive jurisdiction over the transportation and sale of natural gas in interstate commerce for resale. *Northern Natural Gas Co.*, 372 U.S., at 89. FERC exercises authority over the rates and facilities of natural gas companies used in this transportation and sale through a variety of powers.

Schneidewind, 485 U.S. at 300-01 (footnote omitted).

In light of this long history of consistent holdings, the PSC's characterization of the Second Circuit's decision as premised on an erroneous reading of dicta in *Schneidewind* is itself mistaken. At the time *Schneidewind* was decided, FERC's exclusive jurisdiction over interstate natural gas pipeline facilities was well established. The question in *Schneidewind* was whether that exclusive jurisdiction could be extended to include regulation of the issuance of securities by natural-gas companies, a matter over which FERC has no express jurisdiction. Exclusive FERC jurisdiction over transportation facilities, which are expressly entrusted to FERC in the Natural Gas Act, was a given. In holding that states could not regulate securities offerings that were not regulated by FERC, this Court explained:

The authorities on which respondents rely state only what is now well settled: Congress occupied the field of matters relating to wholesale sales and transportation of natural gas in interstate commerce. *See, e.g., Illinois Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498, 506-507 (1942).

Schneidewind, 485 U.S. at 305.¹¹

¹¹ FERC has repeatedly stated its view that the jurisdiction it enjoys over interstate natural gas transmission facilities pursuant to the Natural Gas Act is exclusive and comprehensive. *See, e.g., Texas Gas Transmission Corp.*, FERC Docket No. CP88-413-000, slip. op. at 9 (November 1, 1989) ("[T]he Arkansas Commission does not have jurisdiction over this matter. The transportation services which Texas proposes to provide for Quincy are in interstate commerce and, as such, are exclusively within the jurisdiction of this Commission."); *Williams Natural Gas Co.*, 47 F.E.R.C. (CCH) ¶ 61,308 n.5 (May 31, 1991) (Footnote continued)

Schneidewind and its predecessors cannot be distinguished as being concerned solely with the effect of state regulation on rates for wholesale gas sales, as the PSC contends. *Schneidewind* expressly considered "rates and facilities." 485 U.S. at 300-01, 306. As this Court recognized in *FPC v. East Ohio Gas Co.*, 338 U.S. 464, 468 (1950), the Natural Gas Act specifies that FERC jurisdiction includes the *transportation*, as well as the *sale*, of natural gas in interstate commerce.

§ 1(b) made the Natural Gas Act applicable to three separate things: "(1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale." And throughout the Act "transportation" and "sale" are viewed as separate subjects of regulation. They have independent and equally important places in the Act.

338 U.S. at 468 (quoting *Panhandle Eastern Pipeline Co. v. PSC*, 332 U.S. 507, 516 (1947)).

Schneidewind also cannot be distinguished on the ground that the regulations at issue there could "impede[] — and could easily prevent — construction" of interstate facilities. Petition, p. 16. In *Schneidewind*, Michigan's efforts to regulate securities offerings could, at worst, only have an indirect effect on construction of interstate facilities. Here, as the Second Circuit recognized, PSC proceedings under Article VII "would certainly delay and might well, by the imposition of additional requirements or prohibitions, prevent the construction of federally approved interstate gas facilities," even if those proceedings were limited to the environmental review claimed by the PSC.¹²

1989)("Under section 1(b) of the NGA, the Commission has plenary regulatory authority over all interstate transportation of natural gas"); *Cumberland and Allegheny Gas Co.*, Opinion No. 573, 43 F.P.C. 275, 285 (1970); *In Re Tamborello*, 14 F.P.C. 123, 125 (1955); and *Permian Basin Pipeline Co.*, 12 F.P.C. 1406, 1407 (1953).

¹² As the Second Circuit noted,

The PSC concedes that just such delays were visited upon *amicus curiae* Columbia Gas Transmission Corporation in an Article VII

(Footnote continued)

Petition Appendix A, p. 12a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 576-77.

II. THE SECOND CIRCUIT CORRECTLY CONCLUDED THAT ENVIRONMENTAL REVIEW OF INTERSTATE FACILITIES BY THE PSC IS INCOMPATIBLE WITH FERC'S EXCLUSIVE JURISDICTION.

The PSC contends that there is a distinction between siting of a transmission line on a piece of land and analysis of the steps necessary to protect that land from the impact of the siting. It is a distinction without a difference because FERC has the authority to, and does, consider both issues.

proceeding concerning an interstate gas facility. It argues, however, that those delays were caused by extraordinary and exceptional local opposition. We perceive no reason to expect that local opposition will be an exceptional event, particularly because there may generally be little local benefit from interstate facilities.

Petition Appendix A, p. 12a n.2; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 576 n.2.

The PSC contends that Article VII was intended to expedite, rather than delay, pipeline construction. Nothing in the Second Circuit's opinion precludes a person from complying with a FERC requirement that state or local permits be secured by invoking Article VII. Here, however, National Fuel obtained all FERC-required permits from appropriate agencies and the PSC nevertheless threatened it with \$100,000 a day fines. If FERC directs that permits be obtained from state and local authorities, and those authorities unreasonably delay issuance of their permits, a certificate holder can simply return to FERC and seek to have the requirement that it obtain those permits modified, or even rescinded. (Of course, the State would have a right to intervene in any such proceeding.) *See infra*. n.13, para. 2.

Despite the PSC's attempt to paint Article VII in a different light, Justice Brandeis recognized in *Buck v. Kuykendall*, 267 U.S. 307, 315 (1925) that the primary purpose of a certification provision (like Article VII) is not regulation but prohibition.

National Fuel provided FERC with all of the environmental data required by FERC regulations, including an environmental impact statement pursuant to the National Environmental Policy Act. As the Second Circuit noted, "[t]he FERC expressly considered various data regarding the environmental effects of National Fuel's project before issuing a certificate of public convenience and necessity . . . [and while] [t]he PSC was free to intervene and present whatever contrary data it wished [, i]t declined to do so." Appendix A, pp. 16a-17a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 578-79.

FERC is charged by the Natural Gas Act with exclusive and comprehensive authority over interstate natural gas pipeline facilities. FERC decisions concerning when, where and how to build such facilities must strike a reasoned balance among many different, often competing, considerations, including environmental ones. The PSC cannot "mollify" the site-specific environmental effects of interstate gas pipelines without intruding upon and upsetting the reasoned balance struck by FERC in granting a certificate of public convenience and necessity.¹³ The Second Circuit reasoned that:

¹³ The PSC's contentions that "[t]he established rule has been that state environmental regulation is permissible" and that "its propriety has been recognized by FERC rules" (Petition, p. 9 n.6) are wrong. The Eighth Circuit in *ANR Pipeline Co. v. Iowa State Commerce Commission*, 828 F.2d 465 (2d Cir. 1987) held that Iowa's permit requirement for interstate natural gas pipelines was preempted by federal law. The Court then speculated, without analysis, that environmental regulation of interstate pipelines might not be preempted. 828 F.2d at 473. That speculation was pure dicta, and did not "establish" a rule or purport to be summarizing any previously established rule. Most importantly, the Eighth Circuit's speculation is totally at odds with this Court's subsequent decision in *Schneidewind v. ANR Pipeline Company*, 485 U.S. 293 (1988), which resoundingly affirmed the exclusivity of FERC jurisdiction.

The requirement in 18 C.F.R. Part 380, App. A ¶ 9 (Petition Appendix G, p. 155a) that an applicant inform FERC of state and local permit requirements and health and safety regulations as part of its environmental report serves to ensure that FERC is made aware of state and local interests. FERC can require that such permit requirements be complied with, as occurred here, or FERC may, in the exercise of its exclusive jurisdiction, hold that compliance is unnecessary. See, e.g., *Algonquin Gas Transmission Co.*, 43 F.E.R.C. (CCH) ¶ 61,554, p. 62,373 (June 29, 1988) and *The Sylvania Corp.*, 47 F.P.C. 330, 332 (1972).

Congress placed authority regarding the location of interstate pipelines — in the present case affecting citizens of four states in addition to New York — in the FERC, a federal body that can make choices in the interests of energy consumers nationally, with intervention afforded as of right to relevant state commissions. *Because FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review.* Allowing all the sites and all the specifics to be regulated by agencies with only local constituencies would delay or prevent construction that has won approval after federal consideration of environmental factors and interstate need, with the increased costs or lack of gas to be borne by utility consumers in other states.

Petition Appendix A, p. 17a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 579 (emphasis added).

The issue in this case is not similar to the issue confronted by this Court in *California Coastal Commission v. Granite Rock Co.*, 480 U.S. 572 (1987). The federal choice of land use in that case was not intended to preempt all state regulation of that use, 480 U.S. at 584, nor was there necessarily any inherent incompatibility between the federal land use choice and state regulation, at least so long as the state did not frustrate the federal choice by effectively prohibiting the federally chosen use. 480 U.S. at 586-89. In the Natural Gas Act, Congressional intent to preempt all state regulation of interstate pipeline facilities is expressly stated, and FERC's complete occupation of that field pursuant to the Natural Gas Act is inherently incompatible with state regulation of the same facilities. This Court, moreover, has explicitly recognized that the limitations on the preemptive power of federal regulations that were applied in *California Coastal Commission* are inapplicable to natural gas regulation because of the broad powers conferred on FERC by the Natural Gas Act. *Schneidewind*, 485 U.S. at 309 n.12.¹⁴

¹⁴ Cf., *California v. FERC*, No. 89-333, slip op. (U.S. May 21, 1990) (interpreting in the same manner the Federal Power Act's allocation of state and federal regulatory authority over hydroelectric projects).

III. THE SECOND CIRCUIT PROPERLY APPLIED THE FEDERAL PREEMPTION DOCTRINE.

Contrary to the PSC's contention (Petition, pp. 18-19), Article VII need not be sustained unless it *cannot* be enforced in a constitutional manner. The proper standard, the one employed by the Second Circuit, is whether "there lurks such imminent possibility of collision . . . that [the state regulation] must be declared a nullity to assure the effectuation of the comprehensive federal regulation ordained by Congress." *Northern Natural Gas Co. v. State Corp. Comm'n of Kansas*, 372 U.S. 84, 92 (1963). See also *Schneidewind*, 485 U.S. at 310 and *Maryland v. Louisiana*, 451 U.S. 725, 751 (1981).¹⁵

"Imminent possibility of collision" between FERC regulation pursuant to the Natural Gas Act and PSC regulation pursuant to Article VII is certainly present. Both statutes purport to regulate comprehensively the same facilities. Further, as the Second Circuit recognized, the PSC's recent attempt to preserve a portion of its jurisdiction by offering to limit itself to site-specific environmental review is unavailing because the frustration of federal aims by Article VII proceedings would still be likely.¹⁶ The Second Circuit's analysis of the imminence of such conflict is compelling.

¹⁵ This Court's recent decision in *Webster v. Reproductive Health Services*, ___ U.S. ___, 109 S. Ct. 3040 (1989) is not inconsistent with the standard for preemption employed by the Second Circuit in this case. In the portion of *Webster* cited by the PSC (Petition, p. 18), the Court stated that it would not consider the constitutionality of the preamble to a statute which a state had *declined* to enforce. As the Court explained, "[i]t will be time enough . . . to address the meaning of the preamble should it be applied to restrict the activities of appellees in some concrete way [because federal courts are not empowered to resolve] abstract propositions." 109 S. Ct. at 3050. There is nothing abstract about the PSC's position; the conflict with FERC jurisdiction is real. The PSC has threatened National Fuel with a fine of \$100,000 a day if it begins construction pursuant to its FERC certificate without also securing certification under Article VII.

¹⁶ In addition, as discussed above at pp. 16-18, site-specific environmental review by the PSC directly conflicts with FERC certification proceedings.

[O]nce PSC proceedings begin, [the PSC] can in its discretion attempt to exercise whatever portions of its regulatory authority it chooses, subject only to review by the New York courts with the possibility of discretionary review in the United States Supreme Court. Although its litigating posture in this case is to designate site-specific environmental review as its goal, Article VII offers no guidelines or directions preventing the PSC from attempting to exercise other aspects of its regulatory authority with regard to National Fuel's project. So-called piecemeal application of Article VII would thus allow the PSC to confront interstate transporters of gas with as much of the panoply of Article VII regulation as it chooses and to force them to litigate the preemption question issue by issue in state tribunals. Even if a transporter were ultimately successful before the PSC, the practical effect would be to undermine the FERC approval by imposing the costs and delays inherent in litigation that must be undertaken without any guidelines as to limits on the exercise of state authority.

Petition Appendix A, pp. 15a-16a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 578.

The reality behind the Second Circuit's concerns is amply illustrated by the PSC's proceedings in Case No. 70350 on a Columbia Gas Transmission Corporation pipeline project.¹⁷ In that proceeding, the PSC considered five alternatives to the FERC-approved route, in essence conducting *de novo* review of FERC's routing decisions under the guise of site-specific environmental review. While the PSC adopted a route not significantly different than the FERC-approved route, Columbia Gas was forced to relitigate the routing issues, with all of the delays and uncertainties inherent in that process. Permitting the PSC to apply Article VII to interstate natural gas pipeline facilities opens the door for state regulatory agencies to

¹⁷ The PSC's Order in Case No. 70350, Opinion 89-23 issued July 20, 1989, was submitted as part of the record below by the PSC.

pursue their own parochial agendas, or provide other local interests with a second forum, duplicating FERC, to litigate wholly local concerns implicated by interstate natural gas pipelines.

The record supports the Second Circuit's conclusion that there is an imminent possibility that Article VII proceedings would frustrate federal objectives and conflict with federal decisions. That is sufficient to support its conclusion that Article VII is completely preempted by the Natural Gas Act with respect to interstate natural gas pipeline facilities.

Section 121 subd. 4.c. of the New York Public Service Law cannot "save" Article VII from preemption, as the PSC contends. The Second Circuit properly rejected this argument because direct conflict exists between Article VII, even if limited to site-specific environmental review, and FERC's comprehensive regulatory scheme. *See supra* pp. 16-18. In addition, the purported savings clause does nothing more than restate the PSC's obligations under the Supremacy Clause; it does not guarantee that the PSC will abide by those obligations. As the Second Circuit reasoned:

If the PSC is correct, moreover, no state law, no matter how inconsistent with a federal law, would ever be facially preempted so long as it included a provision stating that the relevant state tribunals would abide by the Supremacy Clause, an obligation to which they are already bound.

Petition Appendix A, p. 16a; *National Fuel Gas Supply Corp. v. PSC*, 894 F.2d at 578.

CONCLUSION

For the foregoing reasons, the Public Service Commission's Petition for a Writ of Certiorari should be denied.

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(6)
No. 89-1749



IN THE
Supreme Court of the United States

October Term, 1989

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, PETER A. BRADFORD, HAROLD A. JERRY, JR., GAIL GARFIELD SCHWARTZ, ELI M. NOAM, JAMES T. MCFARLAND, EDWARD M. KRESKY and HENRY G. WILLIAMS, in their official capacity as Commissioners of the Public Service Commission of the State of New York,

Petitioners,

vs.

NATIONAL FUEL GAS SUPPLY CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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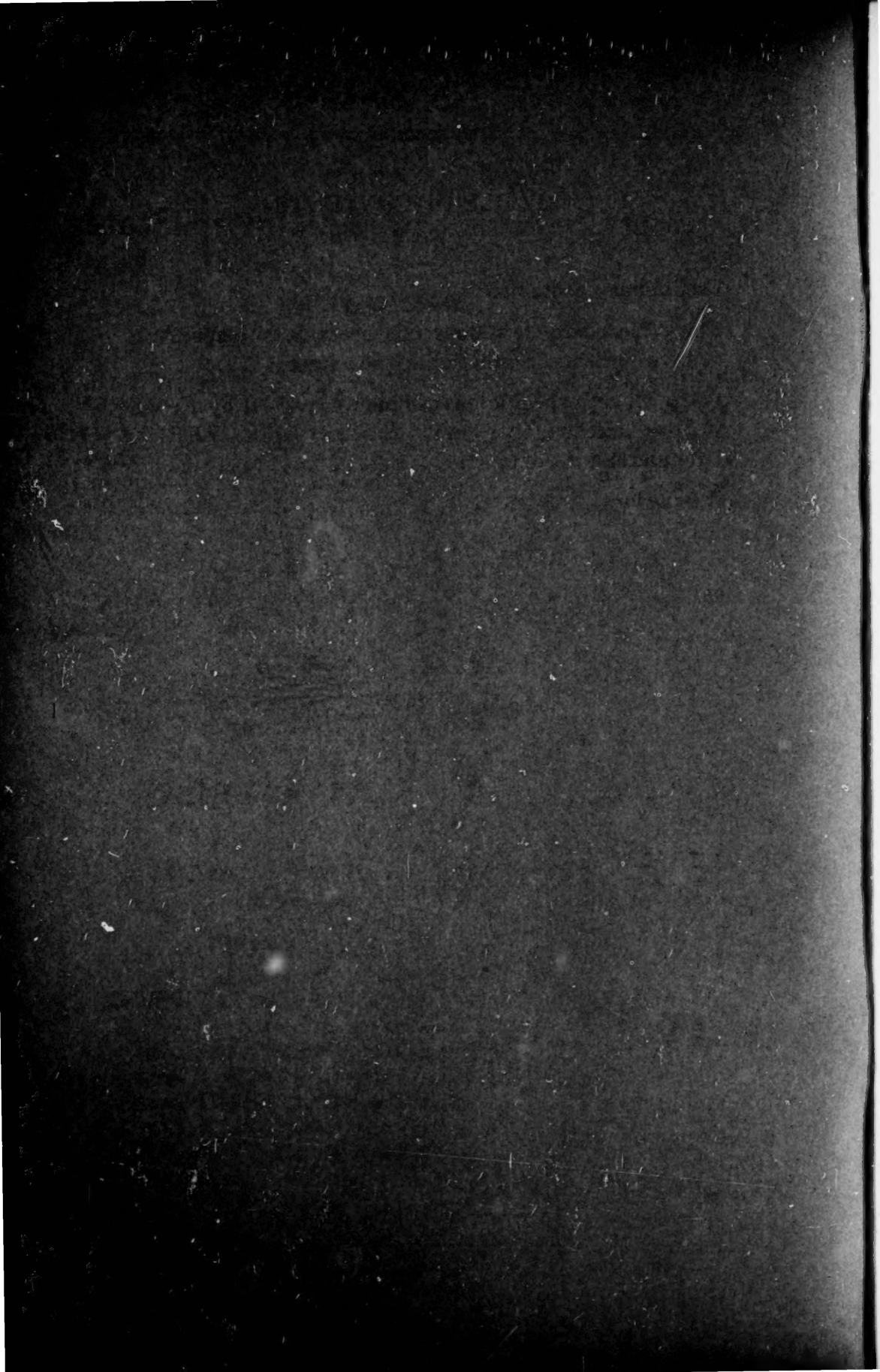


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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

PETITIONERS' REPLY BRIEF



Preliminary Statement

The United States Court of Appeals for the Second Circuit has decided that federal law preempts states from regulating construction practices on interstate gas pipelines. The Public Service Commission of the State of New York and its individual commissioners (PSC) have sought certiorari because no federal statute evidences even the slightest Congressional intent to preempt states from site-specific environmental regulation of interstate gas transmission facilities. Moreover, site-specific environmental regulation is necessary to preserve New York's natural resources, protect its environment and, as discussed below, prevent needless disruption of local communities.

The Commission's petition for certiorari demonstrates that: (1) the legislative history of the Natural Gas Act (NGA) and decisions of this Court emphasize that the statute was *not* intended to diminish the states' regulatory power (Petition, "Pet." 11-13);¹ (2) the lower court misapplied dicta from a recent decision of this Court, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) in reading the NGA as preempting the states (Pet. 16-17); (3) rather than being a preemptive statute, the National Environmental Policy Act (NEPA) was simply designed to require federal agencies to take a "hard look" at the environmental consequences of their actions (Pet. 13); (4) there is no conflict between state site-specific environmental regulation and the Federal Energy Regulatory Commission's (FERC's) certification of interstate gas pipelines (Pet. 13-15, citing Appendix "App." 44a-46a); and, (5) the Second Circuit ignored both this Court's standard for facial challenges to state

¹ Both the Senate and House reports on the Natural Gas Act emphasize that "[t]he bill takes no authority from State Commissions" (see Pet. 12, note 8 for references).

legislation (Pet. 16-17) and case law allowing dual, state and federal, environmental regulation of interstate pipelines (Pet. 18-19).

The respondent, National Fuel Gas Supply Corporation (NFG), has opposed certiorari on the grounds that this Court in *Schneidewind* interpreted the NGA as preempting state regulation of interstate transmission facilities and, in any event, state regulation conflicts with FERC's certification of interstate pipelines.² Point I, *infra*, shows that neither *Schneidewind* nor any other decision of this Court supports NFG's position. Point II establishes that there is no conflict between FERC's regulation and New York's site-specific review of interstate facilities.³

² More specifically, NFG has: (1) failed to cite a single word of the NGA in support of its contention that Congress intended to preempt state environmental regulation; (2) essentially ignored NEPA; (3) answered the PSC's evidence that there is no state/federal conflict with an erroneous claim that FERC regulations calling for the inclusion of environmental data in pipeline filings demonstrate that FERC has preempted the field; and, (4) implied that it has not brought a facial challenge to Article VII.

³ NFG has failed to reference a scintilla of evidence to support its contention that state regulation frustrates federal purposes. Moreover, it has not answered the petition's showing that preemption would endanger New York's wildlife, wetlands, vistas and landmarks.

POINT I

Federal law does not preempt site-specific environmental regulation by the states.

Inasmuch as federal preemption of site-specific environmental regulation of interstate pipelines is supported by neither the language nor the legislative history of the Natural Gas Act, NFG cites *Schneidewind* for the proposition that the NGA preempts all state regulation of interstate facilities (NFG, 13-15). *Schneidewind* simply holds that states can not regulate security issuances relating to interstate projects because such regulation could easily prevent construction of interstate facilities⁴ (485 U.S. at 310) and, in any event, FERC's regulation addresses the concerns covered by the states' review of security issuances. In the Court's words, "FERC directly monitors the same matter through its accounting requirements.... FERC may prevent such problems through its certification power ... FERC's detailed examination of a company's finances includes review of securities issuances...." 485 U.S. at 309. By contrast, FERC does not address in detail site-specific environmental issues covered by Public Service Law Article VII. Indeed, it has recognized that the PSC conducts site-specific environmental review in referring to PSC analyses in environmental impact statements.⁵

⁴ A company constructing new facilities needs funds to hire contractors and acquire materials. If it is unable to issue securities to obtain those funds, it can not build. In contrast, environmental regulation does not impede construction of federally certified activities (App. 44a-46a). *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572 (1987).

⁵ According to NFG, FERC has repeatedly stated that it enjoys exclusive jurisdiction over natural gas transmission facilities (NFG 14-15 n. 11). While FERC has asserted power to determine whether and where an interstate line should be certified, a power which we do not question, it has not attempted to preempt state regulation of site-specific environmental issues.

NFG also contends that *FPC v. East Ohio Gas Company*, 338 U.S. 464, 468 (1950) held that the Natural Gas Act applied to the transportation, as well as the sale, of natural gas (NFG 15). The NGA's application to transportation does not touch upon state environmental regulation.

POINT II

Site-specific environmental review by New York State does not conflict with FERC regulation.

As discussed above, the uncontroverted record evidence demonstrates that the PSC's site-specific environmental review of construction practices does not conflict with FERC's enforcement of its statutory responsibilities (App. 44a-46a). Rather than confront this evidence, NFG argues that a FERC regulation calling for the provision of environmental data on projects such as the respondent's West Seneca facility shows that there is no room for New York's limited regulation (NFG 17).⁶

The respondent's environmental presentation to FERC on West Seneca consisted of 8 pages of text, a typical stream crossing diagram and charts showing soil types crossed (Joint Appendix, Second Circuit Docket No. 89-7458 "Joint Appendix" 127-151). The presentation was supplemented by 1 1/2 pages of material when NFG revised the project (Joint Appendix 178-79), NFG's filing did not: (1) disclose how the applicant would protect streams and flood plains; (2) explain where NFG would obtain and discharge water for its hydrostatic testing of the pipeline; (3) detail how the applicant would handle or store hazardous material; (4) describe how NFG would either control noise or minimize the effects of construction on the local community; (5) specify the erosion control and revegetation methods

⁶ NFG also contends that the PSC has, in the past, delayed completion of an interstate pipeline project by allowing intervenors to its Case 70350 to litigate alternatives to a FERC-approved route (NFG 20). While it is not clear whether the PSC's review of the Columbia Gas pipeline project delayed or accelerated completion of that facility, the latter being more likely, the PSC has since made it clear that its Article VII review will be limited in all cases to site-specific environmental review.

that it intended to use for the soil types identified; or, (6) address the need for topsoil segregation on agricultural lands crossed by the line.⁷

There was no reason for FERC to require NFG to provide such information because FERC did not perform site-specific environmental review of NFG's proposal.⁸ It expressly left site-specific regulation of the West Seneca project to state and local permitting processes (App. 41a).⁹

NFG argues that it has, in any event, obtained its state and local permits from the responsible authorities (NFG 9, n.7). Although NFG did obtain permits for its original line, they have expired and, in any event, were not obtained from the responsible authority, the PSC. New York law centralizes environmental review of

⁷ Differences in streams to be crossed and lands to be traversed require different types of construction methods, which are not addressed by FERC's rules. 18 C.F.R. §2.69 (App. 75a); (App. 45a). Indeed NFG's filing acknowledged the applicant's need to obtain state and local stream and road crossing permits (Joint Appendix 130).

⁸ Moreover, the environmental review that FERC did conduct was pursuant to NEPA, which unquestionably is not a preemptive statute.

⁹ NFG quotes the Second Circuit's observation that the Commission could have intervened before FERC to present "contrary data" that would have addressed the deficiencies in NFG's environmental case (NFG 17). However, the theoretical possibility of New York residents or the PSC intervening in FERC proceedings to raise site-specific issues has no relevance to whether Article VII is preempted by FERC regulation because, absent such intervention, it is clear that FERC's regulation does not address site-specific issues. *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 (1986) [overturning an FCC attempt to preempt state authority to set depreciation charges for intrastate rate-making purposes, notwithstanding the fact that federal law entitled the states to notice and an opportunity heard by the FCC on depreciation].

gas pipeline projects in the PSC¹⁰ and FERC calls for pipeline applicants to comply with local review. Therefore, the lower court had no basis for preempting Article VII.¹¹ *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572 (1987) [wherein this Court relied on federal regulations allowing state environmental regulation to uphold such state regulation].

Inasmuch as the NGA does not give FERC exclusive responsibility for the environmental effects of interstate gas transmission lines, this case is very different from *California v. Federal Energy Regulatory Commission*, _____ U.S. _____, 58 U.S.L.W. 4591 (1990), wherein this Court held that the Federal Power Act preempted states from imposing minimum water flows for federally certified hydroelectric stations. As the Court noted in *California*, the Federal Power Act directs FERC to promulgate licensing requirements to protect wildlife.

¹⁰ A state's method of issuing permits for road or stream crossings should not be preempted unless the federal government has taken over such regulation or the state's method impedes a federal purpose; to wit, the construction of interstate facilities. *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 256 (1984). The record evidence shows that FERC has not taken over such regulation (App. 44a-46a), and Article VII's centralization of permits in the PSC expedites the construction of interstate projects (App. 46a) ["New York State's 'one-stop' permit process generally accelerates construction"].

¹¹ NFG claims that preemption should turn on whether Article VII imposes an "imminent possibility of collision" between state and federal regulation (NFG 19). Even if "imminent possibility" were the correct standard, which it is not (Pet. 18-19), preemption would not be appropriate because the PSC has repeatedly announced that it will apply Article VII in a manner that avoids conflict with FERC (App. 44a-46a).

While the Commission could bring a penalty action against a pipeline that refused to follow any chapter of the Public Service Law, it did not "threaten" NFG with such a suit (NFG 9, n. 7; 16, n. 12; 19, n. 15).

58 U.S.L.W. at 4593, 4595, *citing*, FPA Section 10(a); 16 U.S.C. Sections 803(a)(1)-(3), 803(j)(1)-(2). Inasmuch as a stream can only have a single water flow, FERC's statutory duty could not be met if states were allowed to set higher minimum stream flow requirements than those set by FERC in balancing the need to protect wildlife against project economics. 58 U.S.L.W. at 4595. There is no provision in the Natural Gas Act even resembling FPA Section 10(a) because FERC has not been directed to resolve site-specific environmental issues on interstate pipeline projects.¹²

¹² Unlike the "brief statement" of environmental factors required by 18 C.F.R. Section 157.14(a)(6-d) on interstate pipeline applications, (App. 99a), regulations under the Federal Power Act require a detailed environmental analysis of the environmental effects of hydroelectric projects. See 18 C.F.R. Sections 4.41, 4.51, 4.61.

Conclusion

Respondent National Fuel Gas Supply Corporation argues that this Court should not grant certiorari because all state regulation of interstate natural gas transmission facilities is preempted (NFG 12). Far from demonstrating that certiorari is not warranted, NFG's position only highlights the need for review.

Should federal law be read to bar state regulators from preventing construction of gas transmission lines at the crack of dawn in residential neighborhoods? Should not the states be able to protect streams and wetlands, to control traffic on major local thoroughfares and to preserve local landmarks? Has Congress prohibited the states from attempting to *expedite* the construction of interstate pipelines by centralizing the issuance of local permits in a single agency?

The lower court's answer to these questions will significantly affect local communities and natural resources throughout New York State for years to come. They clearly require further review.

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No. 89-1749

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October Term, 1989

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Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit

**BRIEF OF THE NATIONAL ASSOCIATION
OF REGULATORY UTILITY COMMISSIONERS
AS AMICUS CURIAE IN SUPPORT OF
PETITION FOR CERTIORARI**

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OCTOBER TERM, 1989

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BRIEF OF THE NATIONAL ASSOCIATION OF
REGULATORY UTILITY COMMISSIONERS AS AMICUS
CURIAE IN SUPPORT OF PETITION FOR CERTIORARI

INTEREST OF AMICUS CURIAE

The National Association of Regulatory
Utility Commissioners (NARUC) submits this
brief as amicus curiae urging that the
Petition for Certiorari filed by the Public

Service Commission of the State of New York be granted due to the harm the decision below may have upon the regulation of the environmental impact of natural gas pipeline construction by its member State regulatory commissions. The NARUC files this brief with the written consent of the Petitioners and the Respondent.

The NARUC is a quasi-governmental nonprofit organization founded in 1889. Within its membership are the governmental bodies of the fifty States, and the governmental agencies of the District of Columbia, Puerto Rico, and the Virgin Islands engaged in the regulation of utilities and carriers. The Public Service Commission of the State of New York and its individual commissioners, Petitioners herein (hereinafter "the NYPSC"), are members of the NARUC. The mission of the NARUC is to serve the public interest by seeking to improve the quality and effectiveness of

public regulation in America.

More specifically, the NARUC contains the State officials charged with the duty of regulating natural gas companies operating within their respective jurisdictions. As such, these officials have the obligation to assure the establishment and operation of natural gas facilities which serve the public interest. This means that State regulators must, under law, seek to ensure that safe, dependable, and environmentally sound service is provided consumers at rates that are just, reasonable, and nondiscriminatory.

In the decision for which the NYPSC seeks this Court's review, the United States Court of Appeals for the Second Circuit reversed a decision of the United States District Court, Northern District of New York, which had granted the NYPSC's motion for summary judgment, thereby dismissing a complaint for declaratory ruling filed by

Respondent National Fuel Gas Supply Corporation (hereinafter "National Fuel") alleging that the NYPSC's jurisdiction to require National Fuel to comply with State law to construct an interstate gas pipeline is facially preempted.¹ In reversing the District Court, the Court of Appeals held that the jurisdiction of the NYPSC to regulate the site-specific environmental compatibility of pipeline construction projects was entirely preempted by Federal Energy Regulatory Commission (FERC) regulation of natural gas companies under the Natural Gas Act.

Although the decision of the Court of Appeals frustrates the State of New York's

¹ The decision of the Second Circuit appears at Appendix 1a of the Petition for Writ of Certiorari. This decision has been reported at 894 F.2d 571. The bench decision of the District Court, which is unreported, appears at Appendix 26a of the Petition for Writ of Certiorari. Subsequent reference will be made to these decisions as they appear therein in this form: App. at

efforts to ensure that pipeline construction is conducted in an environmentally compatible manner, the case clearly presents issues of national scope and importance. Because the Court of Appeals found State law to be facially preempted due to the "exclusive jurisdiction of the FERC", the effect of its decision will be to foreclose or sharply limit similar State regulation in every jurisdiction in the country.

Moreover, this case raises questions of first impression not squarely addressed by any other court. Accordingly, unless reviewed and reversed by this Court, the decision of the Court of Appeals will have a profound effect on States not party to this case.² Therefore, as the representative of

² The NARUC has collected information which shows that 20 State commissions in addition to the NYPSC seek to regulate the environmental impacts of the construction of natural gas transmission lines. These States include Arkansas, California, Colorado, Connecticut, Illinois, Maine, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, New Jersey, Oklahoma,

State regulatory officials in each of the States which seek to ensure environmentally sound pipeline construction, the NARUC and its member agencies are vitally interested in the outcome of this litigation.

SUMMARY OF ARGUMENT

This Court should grant the NYPSC's Petition due to the national importance of the issue raised therein, and because the decision of the Second Circuit Court of Appeals conflicts with both decisions of this Court and the views of another Court of Appeals. If left unreviewed, the decision below will directly impede the ability of the States to efficiently ensure that natural gas pipeline construction is conducted in an environmentally compatible manner. It will also sanction further

Pennsylvania, South Carolina, South Dakota, Texas, Virginia, Wisconsin, and Wyoming. NARUC, 1987 Annual Report on Utility and Carrier Regulation at 514-523 (Washington D.C. 1988).

Federal intrusion into areas of regulatory responsibility which are properly within the lawful jurisdiction of the States.

The importance of the issues of Federal law raised in the NYPSC petition cannot be understated. In an era of increasing environmental concern and growing energy demands, these issues will recur in other States with increasing frequency as pipelines expand their transmission systems in the months and years ahead. Clearly, the Court of Appeals' holding that this entire area of environmental review is off limits to State regulators will determine the impact new pipeline construction will have on local communities.

By finding such environmentally-based State regulation to be completely preempted by the Natural Gas Act, the Court of Appeals has erroneously overstated the sweep and scope of FERC regulation of natural gas pipelines in conflict with decisions of this

Court which have recognized "Congress' decision that the interstate gas industry should be subject to a dual regulatory scheme." Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas, 489 U.S. ___, ___, 103 L.Ed.2d 509, 530 (1989). In addition, the one other Court of Appeals which has addressed the issue of State regulation of the environmental impact of pipeline construction, albeit in dicta, found room in the "dual regulatory scheme" for such State authority. In sum, the NYPSC petition should be granted in order to correct the errors of the court below.

ARGUMENT

I. THE COURT OF APPEALS' DECISION MUST BE REVIEWED BY THIS COURT BECAUSE THERE IS NO EVIDENCE THAT CONGRESS INTENDED TO COMPLETELY PREEMPT STATE ENVIRONMENTAL REGULATION

In dismissing National Fuel's request for declaratory relief, the District Court reviewed each of the Federal statutes which

the National Fuel alleged to be preemptive of the NYPSC's ability to regulate the environmental impact of pipeline construction in the State and concluded that in none of these enactments had Congress intended that such State regulation be completely foreclosed. App. at 29a-33a. Specifically, the Court found that neither the Natural Gas Act, 15 U.S.C. 717 et seq. (NGA), the Natural Gas Pipeline Safety Act, 49 U.S.C. 1671 et seq. (Safety Act), nor the National Environmental Policy Act of 1969, 42 U.S.C. 4321 et seq. (NEPA), entirely displaced the NYPSC's jurisdiction under Article VII of the New York Public Service Law.³ Id. The District Court also found that no other court had squarely addressed the precise issue of preemption it confronted, but noted that in dicta, the United States Court of Appeals for the

³ N.Y. Pub. Serv. Law secs. 120-130 (McKinney 1989), reprinted at App. 48a-63a.

Eighth Circuit had found that neither the NGA or the Safety Act expressly preempted State environmental regulation. Id. at 30a, citing ANR Pipeline Co. v. Iowa State Commerce Commission, 828 F. 2d 465, 473 (8th Cir. 1987).⁴

In reversing the District Court's decision, the Court of Appeals relied primarily on the NGA and to a lesser extent, the Safety Act as evidence that Congress chose to entirely preempt regulation of the sort contemplated by the PSC under the provisions of State law. App. at 10a-14a. The court below endorsed National Fuel's argument "that Congress intended to vest

⁴ The Eighth Circuit stated: "Although the question is not before us, we note that [State] regulations concerning the environmental impact of pipeline construction are not specifically preempted by the language of either the [Safety Act] or the NGA. Thus, Iowa may be able to enact legislation to protect its valuable topsoil and other aspects of the environment, as long as the state regulations do not conflict with existing federal standards." 828 F.2d at 473 (footnote and citation omitted).

exclusive jurisdiction to regulate pipelines in the FERC", citing this Court's recent decision in Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988). Id. at 11a. Moreover, the court found that the potential for "conflict" between FERC's authority to certificate pipeline construction under the NGA and the NYPSC's environmental oversight under Article VII is sufficient to demonstrate federal preemption, Id. at 12a, and further, that the NYPSC is unable to take action to avoid such conflict by limiting its regulatory role under Article VII to matters not addressed by the FERC. Id. at 14a-17a. In essence, the Court of Appeals' preemption test is that any subject relevant to the construction or operation of an interstate pipeline which is suitable for decision by the FERC under the NGA is exclusively Federal, and therefore, beyond any State authority.

The NARUC respectfully submits that in

its analysis, the Court of Appeals has misconstrued the scope of Congressional preemption as it relates to the specific question raised in this case and precisely described by the District Court: "...whether federal law preempts a state from requiring an interstate pipeline company to seek environmental compatibility and local permit procurement at a state level." App. at 30a. As we now explain, in its review of National Fuel's facial attack on the NYPSC's jurisdiction, the Second Circuit erred in concluding that Congress had foreclosed all such State regulation through its enactment of the NGA.

As the Court of Appeals described, this Court has established a series of now-familiar tests to determine if Federal regulation under acts of Congress preempts State regulation.⁵ In its decision, the court addressed two "theories" of

⁵ App. at 9a-10a and cases there cited.

preemption: that the NGA vested "exclusive jurisdiction in the FERC to regulate natural gas pipelines used in interstate commerce," and that "Congress has fully occupied the field" that the NYPSC intends to regulate under Article VII. App. at 10a. The Court of Appeals' analysis is consistent with the District Court's conclusion that there are three ways for a court to determine whether or not Congress has chosen to restrict, direct or displace a State's exercise of its inherent police powers to regulate entities operating within its borders.⁶ Congress

⁶ Under our system of federalism, Congress does not authorize a State to exercise its police powers for the protection of its citizens; rather, State authority to regulate is inherent, and survives unless and until an act of Congress forecloses or restricts this power. While a State may not unduly burden interstate commerce, the authority it chooses to exercise over intrastate matters is grounded in its independent existence as a State, and not as a matter of federal authorization. Arkansas Electric Cooperative Corp. v. Arkansas Public Service Commission, 461 U.S. 375, 377 (1983), "...the regulation of utilities is one of the most important of the functions traditionally associated with

can explicitly and directly preempt an aspect of State regulatory authority, or it can pass a statute which comprehensively regulates a commercial or other activity, thereby "occupying the field" to the exclusion of any State power, or it can pass a statute which is not comprehensive, but whose provisions preempt the exercise of conflicting State requirements. App. at 28a-29a.⁷

In this case, there has been no finding by either the District Court or the Court of Appeals, nor could there be, that Congress

the police power of the States."

⁷ In a facial challenge to a State commission's "mere assertion of jurisdiction", as in the case at bar, the Supreme Court has been unwilling to consider as conflicts "hypothetical event[s]" in which State regulation might "compromise important federal interests". Importantly for the case at bar, in such a case, the Court has relied on State assurances that its regulatory body "can make no regulation...which conflicts with particular regulations promulgated by the [Federal agency]." Arkansas Electric Cooperative, supra, 461 U.S. at 389.

has enacted any statute which expressly preempts the State of New York from requiring that National Fuel seek environmental compatibility and local permit procurement from the NYPSC. Rather, the Court of Appeals based its preemption ruling on two grounds: "exclusive" Federal regulation of natural gas pipelines, and the possibility of conflicts between the imposition of Federal and State commands upon National Fuel's pipeline operations. App. at 10a. Specifically, the court below relied primarily upon FERC regulation of natural gas pipeline construction under section 7 of the NGA, 15 U.S.C. sec. 717f, as evidence that Congress intended to foreclose State environmental regulation. App. at 13a-14a.

As the District Court found, however, the NGA is not nearly as comprehensive as the Court of Appeals held, either in general or with respect to pipeline construction

projects. App. at 29a-32a. Simply put, despite the existence of the NGA, natural gas pipelines are regularly subject to regulation by entities other than FERC: retail sales of gas by a pipeline to an end user may be regulated by a State regulatory commission,⁸ the timing of the production of gas for sale to a FERC-regulated pipeline may be regulated by a State commission,⁹ and the interpretation of the contracts which pipelines negotiate with their suppliers is subject to State law applied by

⁸ Panhandle Eastern Pipe Line Co. v. Michigan Public Service Commission, 341 U.S. 329 (1951). "By this Act [the NGA] Congress occupied only a part of the field." 341 U.S. at 334. Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana, 332 U.S. 507 (1947).

⁹ Northwest Central Pipeline Corp. v. State Corporation Commission of Kansas, 489 U.S. ___, 103 L.Ed.2d 509 (1989), noting "Congress' decision that the interstate natural gas industry should be subject to a dual [Federal/State] regulatory scheme." 489 U.S. at ___, 103 L.Ed.2d at 530.

State courts.¹⁰ This does not mean that the NGA is not preemptive, as this Court's decision in Schneidewind v. ANR Pipeline Co., 485 U.S. 293 (1988), clearly shows. Rather, the existence of permissible and valid State regulation, even over matters which go to the heart of pipeline economics such as rates for the direct sale of gas to consumers, gives clear evidence that through the NGA, Congress has not "comprehensively" regulated interstate pipelines to the exclusion of State power. By accepting National Fuel's argument that the NGA "vest[s] exclusive jurisdiction in the FERC to regulate pipelines used in interstate commerce," the Court of Appeals ignored this Court's contrary rulings. Therefore, this Court should grant review of the Court of Appeals' overbroad ruling to limit Federal regulation under the NGA to those matters

¹⁰ Pennzoil Co. v. FERC, 645 F.2d 360 (5th Cir. 1981).

intended by Congress.

**II. THERE IS NO CONFLICT BETWEEN
FERC AND NYPSC REGULATION WHICH
WOULD SUPPORT COMPLETE PREEMPTION
OF STATE ENVIRONMENTAL REVIEW**

Because "occupation of the field" preemption does not apply, the NYPSC's jurisdiction to regulate specific subject matter of this dispute -- the environmental impact of National Fuel's construction of a facility located entirely within the State of New York -- is only preemptible if it directly conflicts with the exercise of the regulatory authority of a Federal agency.¹¹ Given that Congress has not occupied the field of pipeline regulation

¹¹ In a facial challenge to State authority, such as in this case, "hypothetical events" not "likely to occur" are insufficient evidence of the sort of "conflict" necessary to displace State regulatory authority. Arkansas Electric Cooperative, supra, 461 U.S. at 389. Moreover, not every "effect" of State regulation upon activities regulated by the FERC under the NGA triggers "conflict preemption". Northwest Central Pipeline, supra, 489 U.S. at ___, 103 L.Ed.2d at 531.

nor directly foreclosed State regulation of this kind, this issue of first impression is the sole remaining question for analysis. For at least three reasons, it is clear that contrary to the Court of Appeals decision, App. at 12a-18a, the New York program of environmental regulation can exist compatibly with all Federal regulatory requirements.

First, and most importantly, the New York statute at issue herein--Article VII--was written to preclude Federal/State conflicts. As the District Court described, Section 121(4)(c) of Article VII "states that it will not apply to any pipeline or facility over which the federal government has jurisdiction to the extent that federal jurisdiction is exercised to the exclusion of state jurisdiction." App. at 31a, citing California Coastal Commission v. Granite

Rock Company, 480 U.S. 572 (1987).¹² As the Supreme Court determined in Arkansas Electric Cooperative, supra, a State's recognition that it may not implement its regulations in a manner which conflicts with Federal regulation is an important factor in preserving the State regulatory program from Federal preemption, particularly in the case of a facial attack on the State commission's statutory authority. 461 U.S. at 389.

Second, the Federal agency whose jurisdiction is supposedly preemptive--the FERC--has promulgated regulations for the issuance of pipeline certificates (necessary for the abandonment, construction or extension of pipeline facilities) which require that a petitioning pipeline identify, inter alia, "State...safety and health regulations and codes which must be complied with in the construction,

¹² Section 121(4)(a) appears at App. 50a.

maintenance, and operation of the proposed project." 18 C.F.R. Part 380, Appendix A, Section 9.2 (1988) (App. at 154a, emphasis supplied). In addition, FERC regulations include a catch-all provision which requires a pipeline to identify all other State laws to which a pipeline project may be subject. 18 C.F.R. Part 380, Appendix A, Section 9.3 (1988) App. at 154a.¹³ That these sections of the Federal Commission's regulations dealing directly with the matter at hand--environmental compliance--even exist provides clear evidence that the FERC has not construed its jurisdiction over pipeline construction to be comprehensive to the exclusion of State regulation, or that

¹³ Appendix A to Part 380 is entitled "Guidelines for the Preparation of Environmental Reports for Applications Under the Natural Gas Act, as Specified in Section 380.3 of the Commission's Regulations." Section 380.3 of these regulation includes a subparagraph (b)(4) which directs applicants to "[s]ubmit applications for all Federal and State approvals as early as possible in the planning process." 18 C.F.R. sec. 380.3 (b)(4) (App. at 124a, emphasis supplied).

State and local environmental requirements will inevitably conflict with FERC's own regulatory responsibilities. If, as the Court of Appeals held, there were no room for State regulation, these provisions would be irrelevant, unnecessary and unlawful.¹⁴

Finally, the one Court of Appeals that has considered the relationship of State environmental requirements to pipeline construction activities concluded, albeit in dicta, that a State may enact "environmental regulations applicable to interstate pipelines" and provide "remedies for its citizens whose property is damaged during pipeline construction" without running afoul

¹⁴ The fact that FERC has issued these regulations is an important indication of the preemptive scope of the statute. Were FERC defending the lawfulness of these regulations against a preemption challenge, its construction of the NGA to require pipelines to "submit applications for all ... State approvals" (Sec. 380.3(b)(4)) would be entitled to judicial deference under the Chevron standard, given that the statute is silent on preemption of State environmental regulation. Chevron U.S.A., Inc. v. NRDC, 467 U.S. 837, 842-843 (1984).

of the express provisions of the NGA or the Safety Act. ANR Pipeline, supra, 828 F.2d at 473. More importantly, the Eighth Circuit held, in reliance upon a decision by the U.S. Court of Appeals for the Fourth Circuit,¹⁵ that a State may impose safety inspection fees on pipeline construction, including sanctions for nonpayment, as long as such fees do not conflict with Federal requirements. Id. at 474, n. 8. Indeed, such State fees, if reasonable and related to safety inspections of pipeline construction, were found to "further the purpose of the federal statute." Id.

In sum, Congress has not occupied the field of environmental regulation of pipeline construction, and in its facial challenge to New York law, National Fuel has been unable to prove actual conflict with any Federal requirement or policy. Rather,

¹⁵ Tenneco, Inc. v. Public Service Commission, 489 F.2d 334 (4th Cir. 1973).

as in the case of the pipeline inspection fees upheld in ANR Pipeline, supra, New York's environmental regulations "further the purpose" of Federal requirements. The evidence is the FERC's own regulations which not only assume, but anticipate, that State and local environmental requirements will be fully applicable to pipeline applications under the NGA, including applications for pipeline construction under section 7 of the NGA, 15 U.S.C. sec. 717f.

Therefore, given the State's express willingness to apply its regulations in a manner compatible with Federal requirements, this Court should review the ruling of the Court of Appeals in order to preserve the NYPSC's lawful jurisdiction to ensure environmentally compatible pipeline construction.

CONCLUSION

For the reasons herein stated, the NARUC respectfully requests that the Court grant the NYPSC's Petition for Writ of Certiorari.

Respectfully submitted,

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No. 89-1749

**In The
Supreme Court Of The United States**

OCTOBER TERM, 1989

**PUBLIC SERVICE COMMISSION OF THE STATE OF
NEW YORK, PETER A. BRADFORD, HAROLD A.
JERRY, JR., GAIL GARFIELD SCHWARTZ, ELI M.
NOAM, JAMES T. McFARLAND, EDWARD M. KRESKY,
and HENRY G. WILLIAMS, in their official capacity
as Commissioners of the Public Service Commission
of the State of New York,**

Petitioners,

against

**NATIONAL FUEL GAS SUPPLY CORPORATION,
*Respondent.***

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**BRIEF OF THE STATE OF CONNECTICUT AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

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**BRIEF OF THE STATE OF CONNECTICUT AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**

**INTEREST OF THE AMICUS CURIAE,
STATE OF CONNECTICUT**

Pursuant to Supreme Court Rule 37.5, the State of Connecticut, by its Attorney General, files this brief in support of the Petition for a Writ of Certiorari filed by the Public Service Commission of the State of New York, *et al.*, seeking review of a decision of the United States Court of Appeals

for the Second Circuit in *National Fuel Gas Supply Corporation v. Public Service Commission of the State of New York, et al.*, 894 F.2d 571 (1990), attached as Appendix A, 1a-25a, to the Petition filed herein. The State of Connecticut regulates the siting of transmission lines for electricity and fuels through the Connecticut Siting Council, which has statewide jurisdiction analogous to that of the New York Public Service Commission ("PSC"), although it does not have exclusive jurisdiction over environmental matters. See Conn. Gen. Stat. § 16-50g. The purpose of the relevant Connecticut legislation is, *inter alia*:

To provide for the balancing of the need for adequate and reliable public utility services at the lowest reasonable cost to consumers with the need to protect the environment and ecology of the state and to minimize damage to scenic, historic, and recreational values; to provide environmental quality standards and criteria for the location, design, construction and operation of facilities for the furnishing of public utility services at least as stringent as the federal environmental quality standards and criteria . . . with minimal damage to the environment and other values described above.

Conn. Gen. Stat. § 16-50g. Natural gas transmission lines are included in the definition of "facility." Conn. Gen. Stat. § 16-50i(a).

The decision of the Court of Appeals for the Second Circuit could seriously curtail the ability of states to address specific, local environmental issues prior to construction of interstate natural gas pipelines. The decision adversely affects Connecticut's ability to protect the environment and ecology of the state and to minimize the impact of natural gas pipeline construction on the ecological, scenic, and historic environment of the state. The State of Connecticut, therefore, has a direct and substantial interest in this proceeding.

SUMMARY OF THE ARGUMENT

In the United States federal system, it is presumed that federal law does not preempt state law unless Congress intended preemption; the mere existence of federal law without that intent does not support a conclusion of preemption. State participation in regulation of the pipeline construction proposed by National Fuel Gas Supply Corporation ("NFG") has not been preempted by the Natural Gas Act ("NGA"), nor has it been preempted by the National Environmental Protection Act ("NEPA"). Instead, Congress presumed that the states would play a major part in resolving the local environmental problems associated with the siting of interstate pipeline facilities.

The review of the environmental impact of proposed interstate pipeline facilities is a fundamental national objective. However, Congress did not intend that all the goals of the NEPA would be fulfilled from Washington, D.C. Instead, the review of interstate pipeline facilities by state and local agencies is required to supplement federal law where federal agency action has failed to address site-specific questions or environmental issues of a local nature. The legislative history of the NEPA, the NEPA itself, and the regulations promulgated by the Federal Energy Regulatory Commission ("FERC") all provide for complementary action by state and local entities which does not interfere with the federal agency environmental review.

To fulfill the purposes of the NEPA, state and local review, licensing and certification must occur *before* construction. To allow only after the fact attempts by a state to "pursue whatever federal administrative and judicial remedies are available to compel that compliance [with the FERC order]," *National Fuel Gas* at 579, denies states the very role they must occupy in order to fulfill the fundamental purposes of the NEPA.

ARGUMENT

I. CONGRESS DID NOT INTEND TO PREEMPT STATES FROM REGULATING SITE-SPECIFIC ENVIRONMENTAL ISSUES.

Where Congress expressly intended to preempt state law, preemption of state law exists under the Supremacy Clause of the U.S. Constitution, Article VI, cl. 2. *National Fuel Gas, supra* at 575.¹ Determining whether Congress has exercised this preemption power requires an examination of Congressional intent. *Northwest Central Pipeline Corporation v. Kansas*, ___ U.S. ___, 109 S.Ct. 1262, 1273 (1989). Intent can be inferred where Congress has legislated comprehensively to occupy an entire field of regulation, leaving no room for states to supplement federal law. *Id.* at 1273, citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). Here, Congress clearly foresaw that states would supplement federal law in environmental regulation.

Connecticut concurs with the PSC in the conviction that neither the Natural Gas Act nor the National Environmental Policy Act preempts states from mitigating the site-specific effects of interstate gas pipeline projects. Petition at 9.² In enacting the National Environmental Policy Act in 1970,

¹ For a listing of recognized grounds for federal preemption, see *Northwest Central Pipeline Corporation v. Kansas*, ___ U.S. ___, 109 S.Ct. 1262, 1273 (1989); *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 299-300 (1988); *State of California ex rel. State Water Resources Board v. FERC*, 877 F.2d 743, 746 (9th Cir. 1989) (appealed *sub nom California v. FERC*, No. 89-333, slip op. U.S. May 21, 1990).

² The Natural Gas Act, 15 U.S.C. § 717, *et seq.*, does not preempt all regulation of pipelines but explicitly reserves wide jurisdiction to states. It was enacted in 1938 to govern the transportation and sale of natural gas in interstate commerce and to govern natural gas companies. 52 Stat. 821, c. 556; 15 U.S.C. § 717 *et seq.* "The scheme was one of cooperative action between federal and state agencies," not sweeping preemption. *Panhandle Eastern Pipe Line Co. v. Public Service Commission of Indiana*, 332 U.S. 507, 516 (1947).

Congress did not intend to preempt states from concurrent and cooperative regulation of environmental issues. The House of Representatives wrote of "a real need to involve State and local planning and action agencies, whose activities play a major part on the overall environmental problem, in the decisionmaking process." H.R. No. 378, 91st Cong. 1st Sess., 1969 U.S. Code Cong. & Admin. News 2751. The House also recognized that "State and local governments have a large stake in the common problem." *Id.* at 2758.³

The provisions of the NEPA include the Congressional declaration of national environmental policy, 42 U.S.C. § 4331, which

declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments . . . to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

Section 4332(C) of the NEPA directs that all agencies of the Federal Government make environmental statements, comments, and views "of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards" available to the President and the public. Sections 4334(2) and (3) also expressly direct federal agencies to coordinate with other federal *or state* agencies, and to be mindful of the "recommendations or certifications" of other federal *or state* agencies. Far from being preempted or

³ The Conf. Report No. 765, 91st Cong., 1st Sess., 1969 U.S. Code Cong. & Admin. News 2767, concerned with possible unreasonable delay in processing Federal proposals, stated that "[w]ith regard to State and local agencies, it is not the intention of the conferees that those local agencies with only a remote interest and which are not primarily responsible for development and enforcement of environmental standards be included." The PSC with its broad jurisdiction is clearly not among those local agencies having only a remote or parochial interest in environmental impact.

relegated to *post hoc* complaints, Congress recognized that state and local agencies would be authorized to act on environmental matters.

In *National Fuel Gas*, the Second Circuit ignored Congress' provision of a role for state and local agencies, analyzing the Natural Gas Act ("NGA") alone and finding that with the NGA Congress vested exclusive jurisdiction to regulate pipelines in the FERC. *Id.* at 576.⁴ The Second Circuit erred by failing to recognize that the purposes of the NEPA, declared in 42 U.S.C. § 4331, require the cooperation of state regulatory bodies capable of reviewing the impact of federal proposals on areas of local concern at close hand. The PSC seeks not to deny the siting of the pipeline but to take the steps necessary to protect the land from the impact of that siting, such that "damage to the environment is kept within prescribed limits." Petition at 15; *California Coastal Commission v. Granite Rock Company*, 480 U.S. 572, 587 (1987). This is particularly important where a federal agency does not make a site-specific environmental review of a proposed pipeline route, but instead only relies upon generic data and provides only generic solutions to construction impacts on environmentally sensitive areas such as all wetlands or "all stream crossings."

This Court and the lower federal courts have considered numerous cases which turned on the question of whether aspects of regulation of natural gas pipelines had been preempted by federal law and regulation. *See, e.g., Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293 (1988) (Michigan's pre-issuance review of securities preempted by FERC legislation and extensive regulations regarding financing); *ANR Pipeline Co. v. Iowa State Commerce Commission*, 828 F.2d 465 (8th Cir. 1987) (Natural Gas Pipeline Safety Act, 49 U.S.C. § 1671, *et seq.*, preempted state law on substantive safety regulation of interstate gas pipelines); *Northern Natural Gas Co. v. State Corporation Commission of Kansas*, 372 U.S. 84,

⁴ See n. 2, *supra*.

90 (1963) (production or gathering of natural gas reserved to the states); *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 603 (1945) (control over drilling and spacing of wells reserved to the states).

The Second Circuit's reliance on *Schneidewind* is flawed. *National Fuel Gas* at 576-77. Environmental regulation was not an issue nor in any way a part of *Schneidewind*. In that case, this Court held that a natural gas company's capital structure is related directly to the rates FERC allows it to charge. *Id.* at 299-300. Therefore, Michigan's pre-issuance review of securities to be issued by the company was preempted by the comprehensive federal regulatory scheme. The objectives of the Michigan statute were found to "amount[] to a regulation of rates and facilities, a field occupied by federal regulation." *Id.* at 207.

The case now presented to the Court concerns an important aspect of regulation in which Congress intended the states to *supplement* federal law. Environmental regulation has neither been marked out for comprehensive and exclusive federal control nor left entirely to the states. Cooperative effort was intended by Congress, but this necessarily interlocking regulation is defeated by the Second Circuit's allowing NFG to commence construction without a site-specific environmental review of the proposed construction by either the FERC or the appropriate state agencies. The federal objectives of NEPA and the NGA can both be achieved only by allowing concurrent regulation.

II. THE FEDERAL ENERGY REGULATORY COMMISSION'S REGULATIONS PROVIDE A ROLE FOR STATES IN ENVIRONMENTAL REGULATION OF INTERSTATE GAS TRANSMISSION LINES.

In *National Fuel Gas*, the Second Circuit correctly stated that federal regulations promulgated by an agency pursuant

to its delegated authority may preempt state law as readily as federal statutes. *Id.* at 576. The NEPA directed Federal agencies to review their administrative regulations, policies, and procedures to conform to national environmental policy. 42 U.S.C. § 4333. FERC promulgated regulations which require an applicant under the Natural Gas Act to, *inter alia*:

[c]onsult with the appropriate Federal, regional, State and local entities during the preliminary planning stages of the proposed action to assure that all environmental factors are identified.

18 C.F.R. Part 380, App. A ¶ (5) (1989).

The applicant is also required, as part of its NEPA evaluation, to

[i]dentify all necessary Federal, regional, State and local permits, licenses, and *certificates* needed before the proposed action can be completed, *such as permits needed from State and local agencies for construction and waste discharges*. Describe steps which have been taken to ~~secure~~ these permits and any additional efforts still required.

18 C.F.R. Part 380, App. A ¶ 9.1 (1989) (emphasis added) (Appendix to Petition, 155a). The Second Circuit's conclusion in *National Fuel Gas* (that "[b]ecause FERC has authority to consider environmental issues, states may not engage in concurrent site-specific environmental review," *id.* at 579) is error. It flies in the face of these FERC regulations, which contemplate regulation by state and local authorities.

State and local review, licensing, and certification are in fact an integral part of FERC's implementation of NEPA. In approving NFG's proposal, FERC referred specifically to the necessity for NFG to secure "stream crossing and road crossing permits with the appropriate authorities." 44 F.E.R.C. (CCH) ¶ 62,015 (App. C of Petition, 37a-42a). Both

FERC regulations and orders pertaining to this NFG proposal plainly direct that the State of New York (which is the appropriate authority) supplement FERC's consideration of environmental impact.⁵

It is true that the Second Circuit addressed the FERC regulations, albeit summarily. FERC had directed NFG to secure necessary permits. The Second Circuit chose neither to enforce compliance with the FERC orders nor remand the question to FERC, but instead abdicated, stating that "[t]o the extent that the PSC desires to challenge National Fuel's compliance with the FERC order, it may pursue whatever federal administrative and judicial remedies are available to compel that compliance." *National Fuel Gas* at 579. The keystones of the NEPA are prevention of unwarranted adverse environmental impact, open disclosure, and planning — not remedies for destruction wrought.

In order to mitigate degradation of the environment, the environmental study and planning must take place *first*, before construction. The "basic thrust of the NEPA legislation is to provide assistance for evaluating proposals for prospective federal action in the light of their future effect upon environmental factors, not to serve as a basis for after-the-fact critical evaluation subsequent to substantial completion of the construction." *Richland Park Homeowners Association, Inc. v. Pierce*, 671 F.2d 935, 941 (5th Cir., 1982).

⁵ Supplemental state environmental regulation has been part of the implementation of environmental law for decades. State regulation was not preempted in *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 330 (1973) (Florida oil spill statutes were not preempted by the "pervasive system of federal control over discharges of oil" of the Federal Water Quality Improvement Act of 1970, 33 U.S.C. §§ 1161-75 (1970)); *Lake Carriers Association v. McMullan*, 406 U.S. 498 (1972) (Michigan water pollution statute demonstrated concern that it accord with federal law; Michigan regulation of water pollution by federally licensed cargo vessels not preempted); nor in *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 444 (1960) (federal laws which created a "comprehensive set of controls over ships and shipping" did not overcome presumption against preemption of Detroit's smoke abatement code).

Environmental studies should *precede* construction. *National Wildlife Federation v. Andrus*, 440 F.Supp. 1245 (D.C.D.C. 1977). By denying the PSC jurisdiction to certificate NFG prior to construction of the line, the Second Circuit defeats the purposes of the NEPA.

In addition, if the federal agency decision is a fully-informed and well-considered decision, complying with NEPA-mandated procedures, then judicial review should not be concerned with the merits of that decision. *Strycker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227 (1980). The Second Circuit, however, has addressed the merits of FERC's decision in preempting the state certification process which was a part of the FERC orders. When an agency ruling or explanation is inadequate, the normal course is to remand the matter to the agency for reconsideration, not to allow the affected carrier to take a shortcut through the federal courts. See *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95 (1943).

FERC has promulgated regulations to implement the NEPA. The work left to the PSC is to more closely study the proposal, mollify the site-specific environmental effects of the project, and certify it when all studies are complete. The contribution of the PSC in mitigating deleterious environmental impact is necessary and integral to comprehensive federal law not only on the subject of natural gas but also of the environment. Congress intended the states to cooperate with the federal agencies "to create and maintain conditions under which man and nature can exist in productive harmony," NEPA, 42 U.S.C. § 4331 (1970).

CONCLUSION

For the above-stated reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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JUN 11 1990

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

NATIONAL FUEL GAS SUPPLY CORPORATION,
Plaintiff-Appellant,
v.

PUBLIC SERVICE COMMISSION OF THE STATE OF
OF NEW YORK, PETER A. BRADFORD, HAROLD
A. JERRY, JR., GAIL GARFIELD SCHWARTZ,
ELI M. NOAM, JAMES T. McFARLAND, EDWARD
M. KRESKY, and HENRY G. WILLIAMS,
IN THEIR OFFICIAL CAPACITY AS COMMISSIONERS
OF THE STATE OF NEW YORK,
Defendant-Appellees.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF AMICUS CURIAE
STATE OF VERMONT IN SUPPORT OF THE
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**IN THE
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**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**BRIEF OF AMICUS CURIAE
STATE OF VERMONT IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI**

I.

**PRELIMINARY STATEMENT AND STATEMENT
OF INTEREST OF AMICUS CURIAE**

This brief is filed by the State of Vermont as an *Amicus Curiae* in support of The Public Service Commission of the State of New York's (PSCNY's) May 18, 1990 Petition for Writ of Certiorari to the United States Court of Appeals for the Second

Circuit. PSCNY's petition asks the Court to determine, contrary to the holding by the Second Circuit in the case at bar, *National Fuel Gas Supply Corporation v. Public Service Commission of the State of New York*, 894 F.2d 571 (2nd Cir. 1990), that neither the Natural Gas Act, 15 U.S.C. § 717, *et seq.* (NGA), nor the National Environmental Policy Act, 42 U.S.C. § 4321, *et seq.* (NEPA), preempt states from mollifying the site-specific, local environmental effects of federally certificated interstate pipeline projects. The Second Circuit's decision is in conflict both with the Court's Commerce and Supremacy Clause decisions and with the statement of the Eighth Circuit in *ANR Pipeline Company v. Iowa State Commerce Commission*, 828 F.2d 465 (8th Cir. 1987), that state environmental regulation of interstate pipelines is not a matter which is subject to exclusive Federal jurisdiction nor a matter within which concurrent Federal jurisdiction has been exercised.¹

Vermont's interest in this proceeding as *Amicus Curiae* is clear. Section 248 of Vermont's statute, 30 V.S.A. § 248, *et seq.*, "New Gas and Electric Purchases, Investments & Facilities; Certificate of Public Good", provides Vermont with

¹In *ANR Pipeline Company v. Iowa State Commerce Commission*, 828 F.2d 465 (8th Cir. 1987), the Court stated that:

we note that regulations concerning the environmental impact of pipeline construction are not specifically preempted by the language of either the NGPSA [Natural Gas Pipeline Safety Act] or the NGA. Thus, Iowa may be able to enact legislation to protect its valuable topsoil and other aspects of the environment, and to provide private damage remedies, as long as the state regulations do not conflict with existing federal standards. See *Pacific Gas*, 461 U.S. at 216 n.28.

828 F.2d at 473. In a footnote, the Court went on to note that "although there are a significant number of federal environmental regulations applicable to gas pipelines under the NGA, [citations omitted] certain sections of the regulations appear to anticipate such state regulation." *ANR Pipeline*, 828 F.2d at n.7.

authority generally similar to that provided to New York under portions of New York's Public Service Law Section 121 (N.Y. Pub. Serv. Law § 121 (McKinney 1989)), which the Second Circuit incorrectly found to be preempted by Federal Law. Section 248 of Vermont's statute, like portions of New York Public Service Law § 121, provides Vermont with the authority to protect its citizens from a variety of detrimental impacts of pipeline construction which only arise, and can only be dealt with, at a local level. Amelioration of these impacts, such as prevention of erosion of topsoil, and protection of wildlife habitats and other aspects of the environment, are not at all contemplated by the Federal regulatory scheme, and certainly not preempted.

As Vermont has a clear interest in protecting its citizens in these purely local matters, Vermont supports the PSCNY's petition for certiorari in this proceeding. Vermont adopts PSCNY's statements regarding Parties to the Proceeding, Opinions below, Jurisdiction, Questions Presented, Statutory and Regulatory Provisions Involved, and Statement of the Case.

In this brief, Vermont analyzes the four ways in which state regulation may be preempted by federal legislation. This brief demonstrates that, contrary to the findings of the Court of Appeals for the Second Circuit, none of the four applies under the facts of this case. Most significantly, as explained below, Congress explicitly did *not* intend to preempt State regulation of local issues, and preemption of facially valid state regulation can not be inferred. In light of the legislative history of the Natural Gas Act, 15 U.S.C. § 717, and of the nature of FERC regulations, this Court should grant certiorari in this proceeding to reconsider the Second Circuit's order in this case and should allow the state of New York its proper role in interstate pipeline regulation.

II.

SUMMARY OF ARGUMENT

The Supreme Court has generally recognized four distinct types of Federal preemption over a state's regulatory powers; explicit preemption; implicit preemption; preemption based on duly authorized action of a federal agency, and preemption based on a finding that the state action at issue would necessarily conflict with a federal regulatory scheme. None of these types of preemption exist in the instant case.

Explicit preemption exists where, as in the case of the Natural Gas Pipeline Safety Act, 49 U.S.C. § 1671-1686 (NGPSA) a statute specifically indicates an intent to preempt state law in a given area. Neither the NGPSA, the NEPA, the NGA nor any other federal statute express an intent to preempt state regulation of the type found preempted by the Second Circuit. In fact, the relevant federal statutes appear to contemplate such regulation.

Implicit preemption may exist where the general nature of a federal act indicates Congressional intent to occupy the entire field to the exclusion of state regulation. However, both the legislative history of the NGA and subsequent court interpretation of that Act indicate that the NGA was not intended to "occupy the field", but rather was drafted in a way that was "meticulous to take in only territory which this court had held the states could not reach." *Panhandle Co. v. Michigan Commission*, 341 U.S. 329, 335 (1951). The state regulation at issue here is exactly the type of local regulation which the NGA was not designed to address.

Preemption may also be based on the duly authorized action of a federal agency. However, the Supreme Court has made it abundantly clear that such preemption only should be found where the agency has "declare[d] any intention to preempt state

law with some specificity.” *California Coastal Comm’n v. Granite Rock Corp.*, 480 U.S. 572, 107 S. Ct. 1419, 1426 (1987). In this case, the Federal Energy Regulatory Commission (FERC) has not in any way indicated an intent to preempt the state regulation at issue here. In fact, the FERC explicitly required National Fuel to obtain local permits and declined a specific invitation to intervene in the proceedings below.

The final type of preemption addressed by this brief occurs where state action would necessarily conflict with the federal regulatory scheme. That is not the case here; rather, the regulatory scheme at issue contemplates state and local involvement and regulation of the type addressed by the New York statute at issue.

III.

ARGUMENT

Standards For Preemption

The principles of preemption law have been set out by this Court in many cases. In every instance, “[t]he critical question in any preemption analysis is whether Congress intended that federal regulation supersede state law.” *Louisiana Public Service Commission v. Federal Communications Commission*, 476 U.S. 355, 369 (1986). A typical statement of the indicia of that intent is set out in the same case:

Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislated

comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress. Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation. (*Citations omitted.*)

Id. at 368. Preemption is not to be favored, and a court should presume that state law is to be given effect unless the opposite is demonstrated by federal legislation or duly delegated regulatory action. *Chicago and N.W. Transp. Co. v. Kalo Brick and Tile Co.*, 450 U.S. 311 (1981).

A. EXPLICIT PREEMPTION

Congress may express its intent to preempt state regulatory action in clear statutory language. For example, the Natural Gas Pipeline Safety Act, 49 U.S.C. Sections 1671-1686 (NGPSA), expressly preempts the states from adopting any safety standards on interstate pipelines, whether more, less, or equally stringent as the federal standards. Safety standards for intrastate pipelines, on the other hand, are explicitly left for the states to regulate, so long as the state standards are not incompatible with the federal standards. 49 U.S.C. Section 1672(a)(1). States are permitted to act as agents for the federal government in inspecting pipelines and monitoring compliance with the federal standards. When the State of Iowa attempted to require a state safety permit for pipeline construction, using state safety standards that were identical to the federal standards, the permit requirement was struck down because of *explicit* language in the NGPSA. *ANR Pipeline Co. v. Iowa State Commerce Comm'n*, 828 F.2d 465 (8th Cir. 1987). The court stated that the explicit preemption in the statute and the com-

prehensive regulatory scheme forbade not only substantive state legislation, but also state decision-making in the field of interstate gas pipeline safety. *Id.* at 472. However, aside from safety criteria, the NGPSA clearly has no preemptive effect over state regulation of interstate pipelines,² and no other federal statute contains language which could be read as explicitly preempting the state regulations at issue. In fact, as the *ANR* court specifically noted in passing, it appears that states retain the authority to regulate pipelines in regard to environmental and land-use concerns and protection of agricultural land. *Id.* at 473.

B. IMPLICIT PREEMPTION

In sharp contrast to the NGPSA, the NGA contains no explicit language preempting state review. Instead, National Fuel argues that preemption should be inferred from the general nature of the Act and from the alleged state regulatory conflict with a number of its specific provisions. In weighing that argument, this Court should consider its recent interpretation of the NGA in *Northwest Central Pipeline v. Kansas State Corporation Comm.*, 489 U.S. 493, 109 S.Ct. 1262 (1989). The Court held that concepts of conflict preemption 'must be applied sensitively in this area [natural gas production, transportation, and rates] so as to prevent the diminution of the role

²Deliberate congressional preemption as to one set of concerns need not imply preemption of alternative state concerns, even if those alternate state concerns have direct effects upon federal goals. See, e.g. *Pacific Gas & Electric Co. v. Energy Resources Comm'n*, 461 U.S. 190 (1983) (upholding state pre-construction approval of nuclear plants on economic grounds, despite federal licensing provisions re safety criteria); *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48 (2nd Cir., 1988) (in order to avoid preemption, a local government must demonstrate only that there is a legitimate and substantive purpose apart from protecting asbestos workers); *Northwest Central Pipeline*, 489 U.S. 493, 109 S.Ct. 1262 (1989) (upholding state regulation despite direct impacts on rates and natural gas wholesale prices).

Congress reserved to the States, while at the same time preserving the federal role.” 109 S.Ct. 1262 at 1276. The Court ruled in that case that a state regulation governing natural gas production was not preempted by federal law even though the state regulation did have a direct impact on the purchasing decisions and costs of interstate pipelines. 109 S.Ct. 1262 at 1282.

The NGA does require a certificate of public convenience and necessity; however, that requirement is contained in two short subsections, 15 U.S.C. Sections 717f(c)(1) and (e), which do no more than to impose the certification and require a pipeline company to comply with the regulations of FERC.

Unlike the situation in *California v. FERC*, 58 U.S.L.W. 4991 (May 21, 1990), recently decided by this Court, where the comprehensive federal regulatory regime governing the licensing of hydroelectric projects was found to preempt conflicting state regulation, the regulations at issue are primarily of local concern and not addressed by the federal regulatory scheme. As the court noted in *California v. FERC*, there is a “presumption against finding preemption of state law in areas traditionally regulated by the states”, as well as an “assumption that the historic police powers of the states were not to be superseded by the Federal Act unless that was the clear and manifest intent of Congress.” *California v. FERC*, Slip Op. at 5.³ And, unlike the Federal Power Act’s hydroelectric licensing provisions, which “expressly direct that FERC consider a project’s effect on fish and wildlife as well as ‘power and development’ purposes”, *Id.* at 2, the NGA certification requirements are more broadly directed toward promoting and protecting the “public convenience and necessity”, 15 U.S.C. § 717f(c). Terms such as “public convenience and necessity”

³Even in that case, the Court acknowledged the “tension” between its decision and its other federal preemption precedents (Slip Op. at 11), the former being influenced heavily by *stare decisis*. *Id.* at 6.

and “public interest”, found in a regulatory statute, are not unbounded phrases, but derive their meaning from the underlying purposes of the legislation, *NAACP v. FPC*, 425 U.S. 662, 669 (1976). In the use of these terms in the NGA, Congress’ intent was to protect consumers against “exploitation at the hands of natural gas companies”, *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 611 (1944), not to foreclose state regulation to protect local environmental concerns.

At the time the NGA was under consideration by Congress, the Supreme Court had ruled⁴ that states could not control wholesale resale of gas in interstate commerce because of conflicts with the Commerce Clause of the U.S. constitution,⁵ and that such control could only be exercised by Congress.⁶ Therefore, bills were introduced in 1935, 1936, and 1937 to regulate various aspects of the interstate gas industry. The 1935 bill⁷ contained three titles: Title I was eventually passed as the Public Utility Holding Company Act of 1935;⁸ Title II was passed as the Federal Power Act of 1935;⁹ but Title III, the natural gas title, was not reported with the others. The 1936 bill¹⁰ was reported out but not passed. The 1937 bill,¹¹ essentially identical to the 1936 bill, was passed as the Natural Gas Act. The legislative history makes clear that the NGA was conceived as a gap-filling statute, needed because the states were

⁴*Peoples Natural Gas Co. v. Public Serv. Comm’n*, 270 U.S. 550 (1926); *Missouri ex. rel. Barrett v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924); *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923); *Public Util. Comm’n v. Landon*, 249 U.S. 236 (1919); *The Pipe Line Cases*, 234 U.S. 548 (1914); *West v. Kansas Natural Gas Co.*, 221 U.S. 229 (1911).

⁵U.S. Const. Art. I, Section 10.

⁶ *Missouri v. Kansas Natural Gas Co.*, 265 U.S. 298 (1924).

⁷H.R. 5423, 74th Cong., 1st Sess., 70 Cong. Rec. 1624 (1935).

⁸15 U.S.C. §§ 79-79z-6 (1952).

⁹16 U.S.C. §§ 791a-825r (1952)

¹⁰H.R. 12680.

¹¹H.R. 6586, 75th Cong., 1st Sess.

helpless to control monopolistic interstate wholesalers. The report of the House Committee on Interstate and Foreign Commerce on the 1936 bill stated:

The bill takes no authority from State commissions and is so drawn as to be a complement, and in no sense a usurpation, of State regulatory authority Your committee believes this legislation useful and very desirable to fill the gap in regulation that now exists by reason of the lack of authority in the State commissions over interstate transportation.¹²

Likewise, the Committee report of the 1937 bill stated:

There is no intention in enacting the present legislation to disturb the States in their exercise of such [local] jurisdiction. However, in the case of sales for resale . . . in interstate commerce . . . [s]uch transactions have been considered to be not local in character and, even in the absence of Congressional action, not subject to State regulation. . . . The basic purpose of the present legislation is to occupy this field [wholesale interstate natural gas sales] in which the Supreme Court has held that the states may not act.¹³

In sum, the legislative history of the NGA confirms that the NGA was not intended to regulate the natural gas industry to the exclusion of state regulation. *Interstate Natural Gas v. FPC*, 331 U.S. 682, 690 (1947).

The division between state and federal jurisdictions, as determined by Congress, was discussed in *Panhandle Co. v. Michigan Pub. Serv. Comm'n*, 341 U.S. 329 (1951):

¹²H.R. Rep. No. 2651, 74th Cong., 2d Sess., 1, 2-3 (1936).

¹³H.R. Rep. No. 709, 75th Cong., 1st Sess., 1-2 (1937).

It would be an exceedingly incongruous result if a state so motivated, designed and shaped to bring effective state regulation, and particularly more effective state regulation, were construed in the teeth of those objects, and the import of its wording as well, to cut down regulatory power and to do so in a manner making the states less capable of regulation than before the statute's adoption. Yet this, in effect, is what the appellant asks us to do. For the essence of its position . . . is that Congress by enacting the Natural Gas Act has 'occupied the field,' i.e., the entire field open to federal regulation. . . . The exact opposite is the fact. Congress, it is true, occupied a field. But it was meticulous to take in only territory which this Court had held the states could not reach.¹⁴

The court went on to describe the regulatory scheme as the "comprehensive and effective *dual* regulation Congress had in mind."¹⁵ As Justice Frankfurter noted in dissent, *Panhandle* involved "the clearest kind of interstate commerce" and did not involve the utility's "desire to lay pipes in the public highways of Michigan and the power of Michigan to make exactions for such privileges so long as it does not offend the doctrine of unconstitutional conditions."¹⁶

The question then must be asked, what regulatory authority did the states have, prior to the passage of the NGA, to regulate the construction or operation of pipelines within their territories, whether in inter- or intrastate commerce? The parameters of the states' authority, in the context of railroad regulation, were explored in detail in the *Minnesota Rate Cases*, 230 U.S. 352 (1913), a quarter century before the passage of the NGA.

¹⁴*Id.* at 335.

¹⁵*Id.* at 336 (emphasis added).

¹⁶*Id.* at 337.

[I]t is competent for a State to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals and welfare of its people, although interstate commerce may incidentally or indirectly be involved.¹⁷

Environmental concerns and land-use planning and regulation are now expressed in a vocabulary that was not fashionable a century ago. However, they reflect the very "health, safety, morals, and welfare of its people" that the *Minnesota Rate Cases* found the states had authority to protect. Many more recent cases reach essentially the same point.¹⁸ Construction review by the States is not forbidden by federal statute or the federal Constitution and the states retain, undisturbed, considerable local control over pipeline construction within their borders.

C. AGENCY PREEMPTION

Preemption can also be based upon the duly authorized action of a federal agency, either through a preemptive statement or a pervasive set of regulations that demonstrate an intent to fully occupy a relevant field. Existing FERC regulations suggest neither an express nor an implied intent to pervasively occupy the field in regard to construction of new pipelines. Most

¹⁷*Id.* at 402.

¹⁸*See, e.g., California Coastal Comm'n v. Granite Rock*, 480 U.S. 572 (1987), (upholding state environmental regulations of mines with federal permits operating within National Forests); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973) (upholding state law creating tort liability for oil spills, despite a similar, non-exclusive congressional grant of federal maritime and admiralty jurisdiction); *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440 (1960) (upholding local air quality regulation of ships with federal licenses).

importantly, they specifically require compliance with applicable state and local permits — quite the opposite from evincing an intent to preempt such requirements. Moreover, there are specific state concerns that are not addressed by FERC in its regulations and thus in its certification process. For example, FERC regulations do not require that an applicant demonstrate the absence of undue environmental degradation in order to receive a certificate. This is precisely the sort of concern that is not preempted by the federal scheme.

Thus, this regulatory structure is very different from that reviewed in *California v. FERC*, *supra*, or *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 108 S.Ct. 1145 (1988). There, the Supreme Court specifically relied upon the precise, detailed, and explicit federal regulations that were designed to achieve the goals addressed by the relevant state laws. No such set of regulations exists in regard to FERC's review of proposed pipeline facilities.

The Supreme Court has recently explained that, if a federal agency intends its regulations to preempt state law, “[I]t is appropriate to expect an administrative agency to declare any intention to preempt state law with some specificity:

[B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, . . . we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt.

California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 107 S.Ct. 1419, 1426 (1987), quoting *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 718

(1985). Nothing in the FERC regulations purports to oust the state from all jurisdiction over the construction of a proposed interstate gas pipeline. Further, the FERC's own interpretation of its regulations, as evidenced by its action in this case, are particularly instructive: the record indicates that the FERC explicitly required Natural Fuel to obtain applicable local permits and explicitly declined an invitation to intervene in this proceeding.

D. CONFLICT WITH THE FEDERAL SCHEME

Courts may also hold state regulation preempted where Congress, or an agency properly authorized by Congress, has occupied a field of regulation, and state action would necessarily conflict with the federal regulatory scheme. However, the NGA does not clearly imply any federal need to create a uniform national system on all aspects of gas pipeline construction, and the legislative history of the NGA¹⁹ indicates that Congress did not intend to oust the states from the field.

Preemption by actual conflict can only apply after an inconsistent result is reached by state and federal authorities. National Fuel's challenge to state jurisdiction, as upheld by the Second Circuit, is a facial challenge; such a challenge is sustainable only if the federal regulatory regime so clearly excludes concurrent state review that there is no possible factual circumstance in which the state law could be lawfully applied. As the Supreme Court has observed, a general federal purpose to encourage a particularly activity does not preempt state regulation which incidentally prohibits that activity in an area where the state regulation is not otherwise prohibited. *California Coastal Comm'n v. Granite Rock*, 480 U.S. 572 (1987);

¹⁹See discussion, *supra*, at 9-11.

Silkwood v. Kerr-McGee, 464 U.S. 238 (1984); *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983).

In reality, the federal and state regulatory programs at issue here are compatible. The FERC regulations clearly contemplate state and local involvement in permitting and land-use planning; the regulations under NEPA are especially suggestive of a state role in environmental control. See FERC regulations Sections 2.69(a), 2.69(a)(1)(xiii), 2.69(a)(3), 157.14, 380.3(a)(3)&(4), and guidelines pursuant to 380.3 numbers 9.1, 9.2, 9.3, and 10.2.1. The FERC-NEPA regulations and guidelines, Sections 80 *et seq.*, are generally directed at instructing the applicant on issues to be examined in the application. Implicit in them is that FERC will consider those issues in preparation of its Environmental Impact Statement. Neither explicit nor implicit, however, is the intent that *only* FERC may consider those issues.

As discussed, the record in this case demonstrates both (1) that FERC explicitly contemplated state review of "stream crossing and road crossing permits" (A. 38) and (2) that FERC declined National Fuel Gas' request to intervene in this proceeding. Thus, hypothesis about actual conflict with federal purposes are not merely speculative, but actually contrary to the record below.

IV.

CONCLUSION

For all the foregoing reasons, Vermont asks that the Court grant NYPSC's petition for Writ of Certiorari.

Respectfully submitted,

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